IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 05-cv-329-GKF(SAJ)**
	)	
TYSON FOODS, INC., et al.,	)	
	)	
Defendants.	)	

STATE OF OKLAHOMA'S RESPONSE IN OPPOSITION TO "DEFENDANTS' MOTION FOR JUDGMENT AS A MATTER OF LAW BASED ON A LACK OF STANDING" [DKT #1790]

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Plaintiff, the State of Oklahoma ("the State"), respectfully requests that "Defendants' Motion for Judgment as a Matter of Law Based on a Lack of Standing" [DKT #1790] ("Motion")[1] be denied in its entirety.

I. Introduction

This Motion marks Defendants' *third* attempt for dismissal of certain of the State's claims on the basis of standing. *See* DKT #1076 (Rule 12(c) motion) & #1235 (Rule 12(b)(6) motion). The first two attempts were denied, *see* DKT #1187, #1435 & #1439, and this new attempt should be denied as well for the reasons that follow:

First, Defendants' Motion is facially improper as it is not founded on any applicable Federal Rule of Civil Procedure.

Second, in the Arkansas River Basin Compact, Congress granted Oklahoma the right to develop and use a share of the water of the IRW, and to use state and federal pollution control laws to combat pollution. In light of these legally protected interests, it is indisputable that the State has standing to prosecute the current action.

Third, Defendants, in direct conflict with the position they are taking here, unequivocally asserted in the *City of Tulsa* litigation that the State is the owner of waters encompassed within the historical bounds of the Cherokee Nation (in that instance, the similarly-situated waters of the Eucha and Spavinaw).

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[1] Defendants' Motion was originally styled as "Defendants' Motion to Dismiss for Failure to Join the Cherokee Nation as a Required Party or, in the Alternative, Motion for Judgment as a Matter of Law Based on a Lack of Standing." *See* DKT #1788. As it was a multi-part motion, the Court split it into two motions, with "Defendants' Motion to Dismiss for Failure to Join the Cherokee Nation as a Required Party" maintaining DKT #1788, and "Defendants' Motion for Judgment as a Matter of Law Based on a Lack of Standing" becoming DKT #1790. *See* DKT #1788 & #1790. Accordingly, the State is responding separately to these two motions. In order to minimize duplication, however, the State does incorporate by reference its Response in Opposition to "Defendants' Motion to Dismiss for Failure to Join the Cherokee Nation as a Required Party."

Fourth, as explained in its responses to Defendants' earlier motions on the topic of standing, *see* DKT #1111 & #1255, and its response to "Defendants' Motion to Dismiss for Failure to Join the Cherokee Nation as a Required Party," *see* DKT #1810, as well as below, the State not only has sufficiently alleged that it has standing, but also has established as a matter of fact and law that it indeed does have standing to bring the damages claims it is asserting by virtue of its sovereign interests, its quasi-sovereign / parens patriae interests, its trustee interests and its property interests.

II. Background

A. The scope of Defendants' Motion

The scope of Defendants' Motion must be made clear from the outset. The plain language of their Motion makes clear that Defendants are *not* seeking judgment as a matter of law on standing as to *all* of the State's claims. Specifically, Defendants have not moved for judgment as a matter of law as to the State's claims for injunctive relief. Rather, Defendants have moved for judgment as a matter of law *only* as to the State's claims for *damages*, and then only as to claims for damages *to those natural resources that are owned or held in trust by the Cherokee Nation*. *See* Defendants' Motion, p. 3 (". . . Defendants move for judgment as a matter of law based on the fact that Oklahoma lacks standing to pursue claims *for damages* to natural resources that are owned or held in trust by the Cherokee Nation") (emphasis added).

Furthermore, and in some instances relatedly, Defendants are not challenging *at all* the State's standing to assert its RCRA citizen suit claim, its claim for violation of 27A Okla. Stat. § 2-6-105 and 2 Okla. Stat. § 2-18.1, its claim for violation of 2 Okla. Stat. § 10-9.7 and Okla. Admin. Code § 35:17-5-5, or its claim for violation of Okla. Admin Code § 35:17-3-14 claim. *See* Defendants' Motion, p. 3 ("If the State does not own or hold those resources in trust, then it

lacks standing to assert claims under theories of *state nuisance, federal nuisance, CERCLA, trespass, or unjust enrichment*") (emphasis added).

B. The State's claims

The State is asserting ten causes of action against Defendants: (1) a CERCLA cost recovery claim, (2) a CERCLA natural resource damages claim, (3) a RCRA citizen suit claim, (4) a state law nuisance claim, (5) a federal common law nuisance claim, (6) a trespass claim, (7) a violation of 27A Okla. Stat. § 2-6-105 and 2 Okla. Stat. § 2-18.1 claim, (8) a violation of 2 Okla. Stat. § 10-9.7 and Okla. Admin. Code § 35:17-5-5 claim, (9) a violation of Okla. Admin. Code § 35:17-3-14 claim, and (10) an unjust enrichment / restitution / disgorgement claim. *See* DKT #1215. The State seeks, *inter alia*, injunctive relief and damages from Defendants.[2] *Id.*

The State is asserting its claims in this lawsuit pursuant to its sovereign, quasi-sovereign / parens patriae, trustee and / or property interests. *See, e.g.*, Second Amended Complaint, ¶¶ 5, 78 & 119 [DKT #1215]. Notably, ownership of the natural resources is not a prerequisite for *any* of the State's claims. Further, with the exception of the State's trespass claim, the State need not even have a possessory interest in the natural resources (and even then it need not be an exclusive possessory property interest).

In fact, it is well-recognized, except by Defendants, that the State has sufficient interests in the resources of the IRW to prosecute the claims in this lawsuit. Accordingly, this Court need not determine the precise contours of the Cherokee Nation's interests in the resources of the IRW. In fact this Court has already determined that the State has standing to prosecute the claims in this lawsuit, and should simply reaffirm that decision.

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[2] The State seeks neither damages from, nor an injunction against, the Cherokee Nation. Nor does it seek to adjudicate property rights between the State and the Cherokee Nation. Nor does it seek to directly regulate the conduct of any member of the Cherokee Nation.

III. Argument

A. Defendants' Motion is improper

Defendants' Motion is that "as a matter of law" the State lacks standing to bring certain of its damages claims. Defendants have not identified the rule under which they are making this Motion. If Defendants are moving under Rule 50(a) or 52(c), the Motion is plainly premature because Rules 50(a) and 52(c) are *trial* motions. *See, e.g., Jaasma v. Shell Oil Co.*, 412 F.3d 501, 506 fn 4 (3d Cir. 2005) ("It was premature for the District Court to have decided this case under Fed. R. Civ. P. 50(a). The Court may grant judgment as a matter of law under Rule 50 if the motion is brought 'during a trial by jury' after the non-moving party 'has been fully heard on an issue.' Fed. R. Civ. P. 50(a)"); *Williamson v. Horizon Lines, LLC*, 2008 WL 2222052 (D. Me. Feb. 11, 2008); *Dawson v. Johnson*, 266 Fed. Appx. 713, 718 (10th Cir. 2008) (noting that Rule 50(a)(2) motions occur during trial); *Davis v. Rice*, 2008 WL 2397570, *1 (D. Kan. June 10, 2008) ("Rule 52(c) authorizes the court to enter judgment against a party on a particular issue in a non-jury trial, and thus is not applicable to the present action in which no trial to the court is being conducted"); *Diskin v. Unified School District No. 464*, 1996 WL 717328, *1 (D. Kan. Nov. 18, 1996) ("Rule 52(c) vests a judge with the discretion to enter judgment on any issue after hearing all of a party's evidence"). This action has not yet progressed to the trial stage, and therefore a motion under Rule 50(a) or 52(c) is at this stage of the proceedings improper.

Further, Defendants have disclaimed that they are moving under Rule 56, *see* DKT #1797, p. 6 ("Indeed, summary judgment motions have yet to be filed"), so the Motion should not be considered a summary judgment motion. Underscoring this fact, the Motion fails to comply with the requirements of LCvR 56.1(b), which in itself would warrant it being denied. *See* LCvR 56.1(b) (requiring that brief in support "*shall* begin with a section that contains a

concise statement of material facts to which the moving party contends no genuine issue of fact exists. The facts *shall* be numbered and *shall* refer with particularity to those portions of the record upon which movant relies") (emphasis added). Moreover, it should be noted that under LCvR 56.1(a) a party may file only one Rule 56 motion, and were it such a motion Defendants would be precluded from filing any further motions for summary judgment.

Finally, Defendants have previously brought Rule 12 motions to dismiss on the issue of standing, *see* DKT #1076 (Rule 12(c) motion) & #1235 (Rule 12(b)(6) motion), and those motions have already been denied, *see* DKT #1187, #1435 & #1439, so the Motion clearly cannot be a judgment on the pleadings. Moreover, nowhere in their Motion do Defendants even mention Rule 12.

Simply put, Defendants' Motion is an improper motion under the Federal Rules of Civil Procedure, and it should not be considered.

B. The State has standing pursuant to the Arkansas River Basin Compact

The Court need look no further than the 1973 Arkansas River Basin Compact to resolve this Motion. In 1973 Congress approved the Arkansas River Basin Compact, the major purposes of which are the “equitable apportionment of the waters” of the Arkansas River Basin between the States of Arkansas and Oklahoma and the encouragement of the maintenance of an active pollution abatement program in each of these states. *See* 87 Stat. 569 & 82 Okla. Stat. § 1421, Articles I(B) & (D). This Compact established, as a matter of federal law, that the State has the right to "develop and use" the waters of the IRW, so long as it does not deplete the annual yield by more than sixty percent. *See* 87 Stat. 569 & 82 Okla. Stat. § 1421, Articles II(A-H) (defining sub watersheds) & IV(F) (allocating water). Significantly, Article VII(E) of the Compact authorizes the State's use of federal and state pollution laws to resolve pollution problems in its

portion of the Arkansas River Basin. Interstate compacts, when approved by Congress, have the force and status of federal law. *Tarrant Regional Water Dist. v. Sevenoaks,* 545 F.3d 906, 909, fn. 1 (10th Cir. 2008) (construing Red River Compact apportioning water among four states). The right to "develop and use" water and to use federal and state pollution laws to resolve pollution problems authorized in this Congressionally-approved compact amounts to Congressional recognition of the State's legally protected interests to both the water and its purity. In light of these legally protected interests, it is indisputable that the State has standing to prosecute the current action, and the Court need proceed no further in its analysis.

C. In previous litigation Defendants have admitted that waters similarly situated to those at issue here are owned by the State

A central premise of Defendants' Motion is that the State has no interest in the waters at issue in this case. Yet in the *City of Tulsa* litigation Defendants took a position that directly conflicts with that premise.

- "*The State of Oklahoma is the owner* of Spavinaw Creek, and thereby, the water that flows into Lakes Eucha and Spavinaw." Ex. 1, p. 4, ("Motion of Separate Defendant Cargill, Inc. and Brief in Support of Supplemental Motion for Partial Summary Judgment," DKT #238, in *City of Tulsa v. Tyson Foods, Inc.*, Case No. 01-CV-0900) (emphasis added).

- "Tulsa does not own Lake Eucha and Spavinaw, *the State of Oklahoma does*." Ex. 2, p. 22 ("Poultry Defendants' Reply to Plaintiffs' Response to Poultry Defendants' Motion for Summary Judgment or in the Alternative for Partial Summary Judgment," DKT #282, in *City of Tulsa v. Tyson Foods, Inc.*, Case No. 01-CV-0900) (emphasis added).

- "The water is *owned by the State of Oklahoma*. . . . This lawsuit is brought over a body of water, or waters I should say, Spavinaw and Eucha, that are *owned by the State of Oklahoma* . . . ." *See* Ex. 3, pp. 110-114 (R. Stratton Taylor, Esq., counsel for Tyson Defendants at Jan. 3, 2003 Hearing Transcript, in *City of Tulsa v. Tyson Foods, Inc.*, Case No. 01-CV-0900) (emphasis added).

- "[The City of Tulsa's water right] "is a right . . . that *could only be obtained from the State of Oklahoma*. . . . [T]he right doesn't come from their land; *it comes from the State of Oklahoma*." *Id.* at 117-19 (John H. Tucker, Esq., "for Cargill and the other defendants") (emphasis added).

The Eucha-Spavinaw Watershed and the IRW are both within the historical boundaries of the Cherokee Nation. *See* Ex. 3 to Defendants' Motion. Thus, with respect to the issue of State interests in the waters, Spavinaw Creek and Lakes Eucha and Spavinaw are similarly situated with the Illinois River and its tributaries and Lake Tenkiller. Defendants are telling one judge in the Northern District that the State owns the water within the historical boundaries of the Cherokee Nation and another judge in the Northern District that the State does not. Defendants' argument in favor of dismissal should not be credited. Simply put, Defendants have already conceded in other litigation that the State does have standing.

D. Although the Defendants have misrepresented the nature and extent of the Cherokee Nation's interests in the IRW, the Court need not determine the exact contours of the Nation's interests in order to find the State has standing

The central premise of Defendants' Motion is that the Cherokee Nation has an *exclusive* interest in *all* the land, water and natural resources in the IRW in Oklahoma, and that the State has *no* legally protected interests in the land, water and natural resources in the IRW in Oklahoma. This is simply an inaccurate characterization of both the nature and extent of the interests that the Cherokee Nation and the State have in the land, water and other natural resources in the IRW in Oklahoma. While the Court need not determine the exact contours of the interests of the Cherokee Nation in order to find the State has standing, the State provides the following analysis of the history of Congressional action regarding the Cherokee Nation which demonstrates that the Defendants' assertions are unfounded.

1. By virtue of Congressional action, the interests of the Cherokee Nation in the land, water and other natural resources in the IRW in Oklahoma have been diminished

a. Interests in the water

Contrary to the suggestion by Defendants, nothing in either the 1833 Treaty with the Western Cherokee or the 1835 Treaty of New Echota expressly conveys title to the water. Rather, the 1833 Treaty with the Western Cherokee expressly conveyed *land*.[3] *See* 7 Stat. 414 (conveying to the Cherokee "seven millions of acres of land"). Similarly, the 1835 Treaty of New Echota expressly conveyed *land*. *See* 7 Stat. 478 (conveying to the Cherokee "the following additional tract of land"). No mention is made of water in either treaty.[4] If an implicit right to water is to be read in the 1833 Treaty with the Western Cherokee and the 1835 Treaty of New Echota then those Treaties impliedly conveyed no more than a *"Winters* right" to the water within these conveyances. Under *Winters v. United States*, 207 U.S. 564 (1908), when the Federal Government reserves land, by implication it reserves water rights necessary to accomplish the purposes of the reservation. Significantly "[t]he implied-reservation-of-water-rights doctrine, however, reserves only that amount of water necessary to fulfill the purpose of the reservation, no more." *Cappaert v. United States*, 426 U.S. 128, 141 (1976). Such an implied right in favor of the Cherokee Nation, to the extent it ever in fact existed, was never

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[3] The cases Defendants cite for the proposition that these treaties conveyed an interest in water are not on point. *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970), held that the United States conveyed to the Cherokee, Choctaw and Chickasaw Nations, title to *land* underlying the *navigable* portion of part of the Arkansas River in Oklahoma. *Choctaw* did not address water. In fact, Justice White in his dissent points out that "*[n]o one* suggests that the Cherokees were granted full sovereignty over the Arkansas River . . . ." *Choctaw*, 397 U.S. at 652 (emphasis added). In short, *Choctaw* says nothing about water.

Likewise, *United States v. Grand River Dam Authority*, 363 U.S. 229 (1960), did not decide the question of whether the Cherokee Nation owns the water. The principal holding in *Grand River* was simply that "[w]hen the United States appropriates the flow either of a navigable or nonnavigable stream pursuant to its superior power under the Commerce Clause, it is exercising established prerogatives and is beholden to no one." 363 U.S. at 233. As such, the Grand River Dam Authority was not entitled to compensation for being deprived of its opportunity to utilize the flow of the water to produce power.

[4] Contrary to their suggestion in their Motion, p. 8, articles 5, 6, and 26 of the 1866 Treaty with the Cherokee do not address natural resources.

quantified, and there is absolutely no reason to believe that in water-rich eastern Oklahoma that the Cherokee Nation would have needed *all* of the water flowing through the lands conveyed to the Cherokee Nation or that the Cherokee Nation ever actually used *all* of that water. Thus, a *Winters* right would not have been an exclusive right to the water in the IRW. *See, e.g., Sierra Club v. Block*, 622 F.Supp. 842, 852 fn. 7 (D. Colo. 1985) ("State law appropriators acquiring rights after a federal reservation receive only a defeasible property right until the extent of the federal right is established") (citations omitted).

Important, however, to the extent one was in fact impliedly conveyed, any such *Winters* right was supplanted by the Organic Act of 1890, by which Congress provided for the adoption of Chapter 20 of the Mansfield Digest of the Statutes of Arkansas, which included the common law of England, as the law in Indian Territory. *See* 26 Stat. 81, § 31; *Franco-American Charolaise, Ltd. v. Oklahoma Water Resources Board*, 855 P.2d 568, 572 fn. 8 (Okla. 1990) (explaining this fact and noting that "[t]he riparian right was a part of the English and American common law that came to be extended over the State"). The common law of England, Congressionally imposed on Indian Territory, included the law of riparian rights, and thus the law of riparian rights dictated what interest the Cherokee Nation held in the water after 1890.[5] *See, e.g., Kansas v. United States*, 249 F.3d 1213, 1229 (10th Cir. 2001) ("An Indian tribe retains only those aspects of sovereignty not withdrawn by treaty or statute"); *United States v. Wheeler*, 435 U.S. 313, 323 (1978) (noting that specific treaty provisions or unilateral action by Congress may alter a tribe's sovereign rights).

[5] *See, e.g., Harris v. Brooks*, 283 S.W.2d 129, 132 (Ark. 1955) (riparian doctrine, long in force in Arkansas and many other states, is based on the old common law; the appropriation doctrine has never been adopted in Arkansas).

As explained in *Franco-American*, "[r]iparian rights arise from land ownership, attaching only to those lands which touch the stream. A riparian interest, though one in real property, is not absolute or exclusive; it is usufructuary in character and subject to the rights of other riparian owners. A riparian right is neither constant nor judicially quantifiable *in futuro*." 855 P.2d at 573. "[T]he accepted rule allows a riparian owner the right to make any use of water beneficial to himself as long as he does not substantially or materially injure those riparian owners downstream who have a corresponding right." *Id.* at 575.

Beginning in 1902, pursuant to Congressional enactment, lands held by the Cherokee Nation were allotted to individuals. *See* 32 Stat. 716. Each allotment conveyed "all the right, title, and interest of the Cherokee Nation, and of all other citizens, in and to the lands embraced in his allotment certificate." 32 Stat. 716, § 58. Allotments were originally alienable after five years, with subsequent Congressional action extending the restriction on the alienation period. 32 Stat. 716, §§ 14-15 & 47 Sta. 777, § 1. The extent of the interest of a Cherokee Nation member or the Cherokee Nation itself presently holding lands touching the waters at issue in this case is thus a non-exclusive, usufructuary riparian interest that is subject to the rights of other riparian owners.[6]

Thus, the existence of a riparian right to reasonable use of water flowing by any parcel of land owned by the Cherokee Nation, or allottees who have not alienated their allotments, is not

[6] Even assuming arguendo that this riparian usufructuary right to the water were to have remained with the Cherokee Nation rather than being conveyed to the allottee and that this usufructuary right was not extinguished when Oklahoma was admitted to the Union, "treaty-based usufructuary rights do not guarantee the Indians 'absolute freedom' from state regulation." *See Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 204-05 (1999). The Supreme Court has "repeatedly reaffirmed state authority to impose reasonable and necessary non-discriminatory regulations" over Indian use of natural resources in the interest of conservation. *See id.* at 205 (addressing usufructuary right to hunt, fish and gather). Significantly, "Indian treaty-based usufructuary rights are not inconsistent with state sovereignty over natural resources." *See id.* at 208.

an exclusive or ownership interest of the Cherokee Nation in all the water in the IRW. The existence of a right to reasonable use of water attaching to land ownership does not equate to a right to use all of the water in the IRW or a right to prevent the State from using or regulating the water in the IRW. In sum, the fact that the Cherokee Nation (to the extent that it is a riparian owner), has a right to use *some of* the water in the Illinois River and its tributaries does not deprive the State of standing to pursue this lawsuit.

b. Interests in the land

With respect to land, the State acknowledges that in *Choctaw*, the Supreme Court held that the United States conveyed to the Cherokee, Choctaw and Chickasaw Nations title to land underlying the navigable portion of part of the Arkansas River in Oklahoma. 397 U.S. 620. However, for purposes of the issues raised in this litigation, the Illinois River and its tributaries are non-navigable, and thus *Choctaw* is simply inapplicable to the analysis. *See, e.g., Tobin v. Pennington-Winter Construction Co.*, 198 F.2d 334, 335 (10th Cir. 1952) ("The Illinois River, *a non-navigable stream*, is a tributary of the Arkansas River, which in turn empties into the Mississippi River. The Arkansas and Mississippi Rivers are both navigable") (emphasis added).

As explained above, assuming arguendo that they were inconsistent with English common law, the Organic Act of 1890 supplanted the original rights the Cherokee Nation might have had in river and stream beds of the IRW in Oklahoma with the English common law. *See* 26 Stat. 81, § 31. Under the common law, the riparian landowner owns the bed of an adjoining non-navigable river or stream to its centerline. *See, e.g., Hanes v. State*, 973 P.2d 330, 333 (Okla. Crim. App. 1999) ("Absent language to the contrary, a riparian owner will be found to own the adjacent riverbed to the thread of the stream of non-navigable rivers"). Once the lands of the Cherokee Nation were allotted to individuals early in the twentieth century, these

individual allottees became the holders of these riparian interests in the river and stream beds of the Illinois River and its tributaries. *See, e.g., Hanes*, 973 P.2d at 336-37 ("we find the Cherokee Nation allotted its interest in the riverbed of the Neosho or Grand River to the allottee of the riparian upland"). Thus, except in those instances where the Cherokee Nation itself still owns a riparian lot of land or the allotment was never alienated (*i.e.*, the land remains "Indian Country"),[7] the Cherokee Nation has no ownership interest in the riverbed and streambeds at issue in this lawsuit.[8] The fact that the Cherokee Nation or individual allottees may possess riparian interest in some parts of the streambeds of the IRW does not mean the State lacks standing to pursue a lawsuit to prevent pollution of the streambeds.

c. Interests in the biota

Defendants assert, *see* Motion, pp. 10-11, that the Cherokee Nation has exclusive ownership of the biota in the IRW in Oklahoma. However, Defendants conveniently overlook the fact that nothing in either the 1833 Treaty with the Western Cherokee or the 1835 Treaty of

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[7] As explained in Leslie Hawes, "Indian Land in the Cherokee Country of Oklahoma," *Economic Geography* (Oct. 1942), pp. 401-412, a journal article from 1942: "Most of the land allotted to citizens of the Cherokee Nation has in the short period of three decades passed into the hands of the majority white population. . . . The rate of loss has been least in the eastern, or Ozarkian, section. Even here, the restricted Indians retain only a little over one-third the acreage allotted to them about a third of a century ago." In the subsequent 60 years that percentage has decreased significantly. Indeed, as of 1986, of the original conveyance of seven million acres of land to the Cherokee Nation, only 92,405.97 acres (or less than 2%) remained as Indian Country. *See* Confederation of American Indians, *Indian Reservations: A State and Federal Handbook*, McFarland & Company, Inc., 1986, p. 215.

[8] This is not at all inconsistent with *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U.S. 77 (1922). In that case, the Supreme Court merely stated that "Oklahoma when she came into the Union took sovereignty over the public lands in the condition of ownership as they were then, and, *if* the bed had become the property of [an Indian Tribe], there was nothing in the admission of Oklahoma into a constitutional equality of power with other states which required or permitted a divesting of title." *Id.* at 87-88 (emphasis added). Here, the *Brewer-Elliott* condition precedent is not satisfied, as through the allotment process the beds at issue were not the property of the Cherokee Nation but rather the individual allottees.

New Echota states that the United States conveyed title to biota, including biota in the waters of the IRW in Oklahoma, to the Cherokee Nation. As noted above, the 1833 Treaty with the Western Cherokee and the 1835 Treaty of New Echota conveyed *land*, and not hunting and fishing rights as did other treaties with other tribes in some cases relied upon by Defendants. *See* 7 Stat. 414 & 7 Stat. 478.

The cases Defendants rely upon do not support their broad assertion that the Cherokee Nation "continues to hold sovereign authority over those natural resources to the exclusion of the State." *See* Motion p. 10. For instance, *Mille Lacs Band of Chippewa Indians*, 526 U.S. at 204, dealt not with sovereign rights over or ownership of biota, but with usufructuary hunting and fishing rights "on state land [that] are not irreconcilable with a State's sovereignty over the natural resources in the State" but "can coexist with state management of natural resources." (Internal citations omitted.)

Washington v. Washington Comm. Passenger Fishing Vessel Assn., 443 U.S. 658, 684-85 (1979), involved a treaty specifically reserving tribal fishing rights in "usual and accustomed places" (unlike treaties with the Cherokee Nation), and found that "[b]oth sides have a right, secured by treaty, to take a fair share of the available fish," which catch must be equitably apportioned.

Choctaw Nation, 397 U.S. 620, dealt with the bed of the navigable portion of the Arkansas River, and with neither water nor biota.

Arizona v. California, 373 U.S. 546, 601 (1963), quantified reserved water rights of certain tribes and federal facilities and does not support Defendants' theory of exclusive Cherokee sovereignty over the resources of the IRW.

As noted above, *Winters*, 207 U.S. 564, holds that when the Federal Government reserves land, by implication it reserves water rights necessary to accomplish the purposes of the reservation. *Winters* has no applicability here because of the adoption of the law of riparian water interests by Congress in 1890.

Finally, *Cheyenne-Arapaho Tribes of Oklahoma v. Oklahoma*, 618 F.2d 665 (10th Cir. 1980), did not recognize tribal sovereignty over biota, but rather was a case about hunting and fishing in which the tribe conceded that the State had jurisdiction over non-Indian hunting and fishing on Indian Country, and that hunting and fishing on non-Indian lands located within the 1869 reservation were not subject to exclusive tribal control but rather subject to a system of dual regulation. The Court noted that a number of decisions recognize dual control when needed to support conservation measures, relying upon *Puyallup Tribe v. Department of Game of Washington*, 391 U.S. 392, 398 (1968). *Cheyenne-Arapaho,* 618 F.2d at 667.

Simply put, these cases, individually and collectively, fall far short of supporting Defendants' assertion of Cherokee Nation ownership and sovereignty over all the biota and other resources of the IRW to the exclusion of the State of Oklahoma.

Finally, Defendants ignore 29 Okla. Stat. § 7-204, which provides that "[a]ll wildlife found in this state is the property of the state."

2. The State has legally protected interests in the land, water and other natural resources in the IRW in Oklahoma that it give it standing to prosecute this lawsuit, including those specific damages claims that Defendants have attacked

It is well-recognized that the State has sufficient interests in the resources of the IRW to prosecute the claims in this lawsuit. In fact, this Court has already determined that the State has standing to prosecute the claims in this lawsuit, and should simply reaffirm that decision.

The 1906 Oklahoma Enabling Act provided that the inhabitants of the Oklahoma Territory and Indian Territory could adopt a constitution and become the State of Oklahoma, on equal footing with the original states,[9] provided that "nothing contained in the said constitution shall be construed to limit or impair the rights of person or property pertaining to the Indians of said Territories (so long as such rights shall remain unextinguished) or to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights by treaties, agreement, law, or otherwise, which it would have been competent to make if this Act had never been passed." *See* 34 Stat. 267. Article I, section 2 of the Oklahoma Constitution carries this requirement into effect. Nothing in this action to seek redress for Defendants' pollution of the IRW violates either the 1906 Oklahoma Enabling Act or the Oklahoma Constitution.

As detailed above, as a result of the Organic Act of 1890 and the Cherokee Allotment Act of 1902 the Cherokee Nation's interests in the land, including non-navigable riverbeds and streambeds, water, and other natural resources (*e.g.*, biota) was diminished. In the Enabling Act of 1906, 34 Stat., 267, Congress passed "[a]n act to enable the people of Oklahoma and of the Indian Territory to form a constitution and State government and be admitted into the Union on an equal footing with the original States . . . ." Under the equal footing doctrine, the State has a broad range of legally protected sovereign, quasi-sovereign / parens patriae, trustee and property interests in land, water and other natural resources in the IRW in Oklahoma that permit it to prosecute this lawsuit.

[9] The "equal footing doctrine" is "the constitutional principle that all States are admitted to the Union with the same attributes of sovereignty (*i.e.*, on equal footing) as the original 13 States." *Mille Lacs Band*, 526 U.S. at 203.

a. The State has a legally protected quasi-sovereign / parens patriae interest in all land, water and other natural resources in the IRW in Oklahoma

The State has legally protected interests in *all* the land, water and other natural resources located in Oklahoma. These legally protected interests are not dependent on ownership or title (although the State does, indeed, have property interests in many of these resources). As explained by the United States Supreme Court:

> This is a suit by a state for an injury to it in its capacity of quasi-sovereign. In that capacity *the state has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain*. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air.

State of Georgia v. Tennessee Copper Company, 206 U.S. 230, 237 (1907) (emphasis added); *see also Massachusetts v. Environmental Protection Agency*, 549 U.S. 497, ___, 127 S.Ct. 1438, 1454 (2007); *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 355 (1908) ("[I]t is recognized that the state, as quasi-sovereign and representative of the interests of the public, has a standing in court to protect the atmosphere, the water, and the forests within its territory, irrespective of the assent or dissent of the private owners of the land most immediately concerned").

"The Supreme Court has recognized the 'right of a State to sue as parens patriae to prevent or repair harm to its 'quasi-sovereign' interests.'" *Satsky v. Paramount Communications, Inc.*, 7 F.3d 1464, 1469 (10th Cir. 1993) (quoting *Hawaii v. Standard Oil Co. of California*, 405 U.S. 251, 258 (1972)). "Although the Supreme Court has not expressly defined what is a 'quasi-sovereign' interest, it is clear that a state may sue to protect its citizens against 'the pollution of

the air over its territory; or of interstate waters in which the state has rights.'"[10] *Satsky*, 7 F.3d at 1469 (quoting 12 Moore's Federal Practice, ¶ 350.02[3] at 3-20 (1993)); *see also Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 607 (1982) (a state "has a quasi-sovereign interest in the health and well-being -- both physical and economic -- of its residents in general"); *Spiva v. State*, 584 P.2d 1355, 1359 (Okla. Crim. App. 1978) ("That the State has a valid interest in matters which affect the public health, safety and general welfare is undisputed . . . "); *State ex rel. Pollution Control Coordinating Board v. Kerr-McGee Corp.*, 619 P.2d 858, 861 (Okla. 1980) ("the state's common-law right to sue for wrongful destruction of wildlife is not dependent on ownership but rather on the sovereign power to regulate, preserve and protect wild animals and fish for the common enjoyment of its citizenry"); *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979) ("We consider the State's interests in conservation and protection of wild animals as legitimate local purposes similar to the States' interests in protecting the health and safety of their citizens"); *State of West Virginia v. Charles Pfizer & Co.*, 440 F.2d 1079, 1089 (2d Cir. 1971) (recognizing that the parens patriae doctrine "has been used to allow the state to recover damages to quasi-sovereign interests wholly apart from recoverable injuries to individuals residing within the state" and that "these quasi-sovereign interests have included the 'health, comfort, and welfare' of the people, interstate water rights, pollution-free interstate waters, protection of the air from interstate pollutants, and the general economy of the state").

When suing in its quasi-sovereign or parens patriae capacity, the State may seek not only injunctive / equitable relief, *see, e.g., Alfred L. Snapp & Son*, 458 U.S. at 602-606 (discussing cases where states have sued to enjoin public nuisances), but also monetary damages. *See, e.g., Commonwealth of Pennsylvania ex rel. Rafferty v. Philadelphia Psychiatric Center*, 356 F.Supp.

[10] Members of the Cherokee Nation residing in the State of Oklahoma are citizens of the State of Oklahoma. *See* 14th Amendment, U.S. Constitution & 43 Stat. 253.

500, 505 (E.D. Pa. 1973) ("A state may now sue as parens patriae and recover damages for injuries to its 'quasi-sovereign' interests, including harm to the health and welfare of its inhabitants"); *State of Maine v. M/V Tamano*, 357 F.Supp. 1097, 1102 (D. Me. 1973) ("If Maine can establish damage to her quasi-sovereign interests in her coastal waters and marine life, independent of whatever individual damages may have been sustained by her citizens, there is no apparent reason why the present action to recover such damage cannot be maintained"); *Charles Pfizer & Co.*, 440 F.2d at 1089 (recognizing that the parens patriae doctrine has been used to allow the state to recover damages to quasi-sovereign interests).

In fact, the State does exercise its authority in the IRW. For example, the State regulates, controls and otherwise exercises sovereign / quasi-sovereign authority over land, water and other natural resources of the IRW in Oklahoma, thereby confirming that the State has legally protected interests in these resources. *See, e.g.*, Ex. 4 (Affidavit of J.D. Strong, Oklahoma Secretary of the Environment, establishing the State's regulatory, control and management functions through, without limitation, the Oklahoma Department of Environmental Quality, the Oklahoma Water Resources Board, the Oklahoma Department of Wildlife Conservation, the Oklahoma Scenic Rivers Commission, the Oklahoma Department of Mines, and the Oklahoma Department of Agriculture, Food and Forestry).

Thus, it is indisputable that the State has standing to assert its claims for damages under its theories of state law nuisance, federal common law nuisance, and unjust enrichment.

b. For purposes of CERCLA the State has a legally protected trustee interest in all land, water and other natural resources in the IRW in Oklahoma

In a similar vein, for purposes of CERCLA natural resource damages,[11] the State has a legally protected trustee interest in *all* the land, water and other natural resources located in the IRW in Oklahoma. CERCLA specifically provides:

> In the case of an injury to, destruction of, or loss of natural resources under subparagraph (C) of subsection (a) of this section liability shall be to the United States Government and *to any State for natural resources within the State or belonging to, managed by, controlled by, or appertaining to such State* and to any Indian tribe for natural resources belonging to, managed by, controlled by, or appertaining to such tribe, or held in trust for the benefit of such tribe, or belonging to a member of such tribe if such resources are subject to a trust restriction on alienation . . . .

42 U.S.C. § 9607(f)(1) (emphasis added).[12] The resources for which the State is seeking CERLCA natural resource damages are plainly "within the State." Likewise, they are plainly "managed by" and / or "controlled by" the State. *See, supra,* Section III.D. Finally, as demonstrated below, water running in a definite stream, formed by nature, over or under the surface "belongs to" the State within the meaning of CERCLA. *See, infra,* Section III.D.2.c. Thus, it is indisputable that the State has standing to assert its CERCLA natural resource damages claim in this case.

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[11] The State's CERCLA cost recovery claim is not technically a "damages" claim. In any event, by the plain language of 42 U.S.C. § 9607(a)(1)(A), the State's CERCLA cost recovery claim does not depend on an interest in the natural resource at all. Rather, all that is required in a CERCLA cost recovery claim is proof that the State incurred costs of removal or remedial action not inconsistent with the national contingency plan. *See* 42 U.S.C. § 9607(a)(1)(A).

[12] It should not be overlooked that CERCLA contemplates that it is possible that there might be multiple trustees as to a given resource. As explained in *Coeur D'Alene Tribe v. Asarco, Inc.*, 280 F.Supp.2d 1094, 1115 (D. Idaho 2003), "trusteeship [under CERCLA] is not an all or nothing concept. In fact, in many instances, co-trustees are the norm and not the exception." The *Coeur D'Alene* court went on to explain in a subsequent opinion that: "[A] co-trustee acting *individually* or collectively with other co-trustees may go after the responsible party or parties *for the full amount* of the [natural resource] damage, less any amount that has already been paid as a result of a settlement to another trustee by a responsible party." *United States v. Asarco, Inc.*, 471 F.Supp.2d 1063, 1068 (D. Idaho, 2005) (emphasis added).

c. The State has a legally protected property interest in certain water in the IRW

In addition to its quasi-sovereign / parens patriae interest -- its "interest independent of and behind the titles of its citizens, in all the earth and air within its domain" -- and its trustee interest, the State holds property interests (including ownership interests) in many of the natural resources, including certain waters, in the IRW in Oklahoma. These interests arise through the "equal footing doctrine." *See, supra*, Footnote 9. Given that in this case it is only asserting a single claim against Defendants for which a legally protected property interest is a legal prerequisite -- its claim for trespass to waters within Oklahoma that run in definite streams, formed by nature, over or under the surface -- the State will restrict its discussion here to such water.[13]

With respect to water, "water running in a definite stream, formed by nature over or under the surface" is "public water and is subject to appropriation for the benefit and welfare of the people of the state." *See* 60 Okla. Stat. § 60(A). The term "water running in a definite stream" includes lakes. *See Depuy v. Oklahoma Water Resources Board*, 611 P.2d 228, 231-32 (Okla. 1980). "Public water" is the State's water unless and until it is actually appropriated and used by another. *See, e.g., City of Stillwater v. Oklahoma Water Resources Board*, 524 P.2d 938, 944 (Okla. App. 1974) ("Nor do we find anything amiss in characterizing the lake contents as

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[13] "[T]respass involves an actual physical invasion of the property of another." *Fairlawn Cemetery Association v. First Presbyterian Church*, 496 P.2d 1185, 1187 (Okla. 1972). A possessory property interest need not be "exclusive" to support a trespass claim. Instead, a trespass claim may be brought by a person with a possessory interest against anyone with any inferior possessory property right (or no possessory property right at all). *See, e.g., Cooperative Refinery Association v. Young*, 393 P.2d 537, 540 (Okla. 1964) (despite consent to enter land by four of ten cotenants, nonconsenting six cotenants could sue to recover full damages for trespass where land was damaged by salt water pollution); *Lambert v. Rainbolt*, 250 P.2d 459, 461 (Okla. 1952).

'public' water, hence state owned"); *id.* (". . . the state as original owner still owns the water and will continue to do so until it transfers it to some other person or entity"); *Oklahoma Water Resources Board v. Central Oklahoma Master Conservancy District*, 464 P.2d 748, 753 (Okla. 1969) ("Definite nonnavigable streams are public waters. The state may either reserve to itself or grant to others its right to utilize these streams for beneficial purposes"). Public water "is subject to appropriation for the benefit and welfare of the people of the state, as provided by law." 60 Okla. Stat. § 60(A). Notably, however, "[b]oth riparian and appropriative rights are usufructuary only and confer no right of private ownership in the watercourse." *People v. Shirokow*, 605 P.2d 859, 864 (Cal. 1980).[14] As explained by the Tenth Circuit, "[a] water right is a usufruct in a stream, consisting in the right to have the water flow so that some portion of it . . . may be reduced to possession and be made the private property of an individual." *Ronzio v. Denver R.G.W.R. Co.*, 116 F.2d 604, 606 (10th Cir. 1940) (internal quotations omitted). In fact, significantly, "[a]n appropriation is not complete until the water is put to beneficial use." Dan Turlock, Law of Water Rights and Resources, § 5:49.[15]

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[14] The Oklahoma Supreme Court has declared that the California Doctrine of stream water rights, which recognizes riparian and appropriative rights as coexistent, is the prevailing law in Oklahoma. *See Franco-American Charolaise, Ltd. v. Oklahoma Water Resources Board*, 855 P.2d 568, 571 (Okla. 1990).

[15] It is anticipated that Defendants may cite to *Tarrant Regional Water District v. Sevenoaks*, 545 F.3d 906, 913 (10th Cir. 2008), for the proposition that the State does not enjoy an "ownership" in water resources located in the State. While it is not entirely clear what exactly the Tenth Circuit meant when it used this term in quotation marks, what is clear is that a decision on the State's standing with respect to any or all of its claims in this lawsuit does not, as pointed out above, turn on whether or not the State "owns" the resource. Moreover, most certainly the claims in this lawsuit do not turn on whether or not the State "owns" the resource in the context of *Tarrant Regional Water District*. Furthermore, the State would be remiss if it did not point out that that statement by the Tenth Circuit in *Tarrant Regional Water District* was dicta, was made without any real analysis, and was made in the context of discussing Eleventh Amendment immunity under the *Verizon Maryland* case and not in the context of determining the rights or interests in a natural resource per se.

This property interest in the waters of the IRW in Oklahoma has been confirmed by then Secretary of the Environment Miles Tolbert on cross examination in the preliminary injunction proceedings. *See* Ex. 1 to Defendants' Motion, 153:9-19 & 154:2-5 (stating the State claims right, title and interest in the waters of the IRW in Oklahoma). Likewise, Alan Ford, Real Estate Services Administrator at the Oklahoma Department of Central Services and State 30(b)(6) designee, similarly testified that the State asserts standing to sue Defendants under trespass for all waters flowing in definite streams in the Oklahoma portion of the IRW. *See* Ex. 5, Ford Test., 156:18-158:17. It has also been confirmed by Defendants' statements in the *City of Tulsa* litigation. *See, supra,* Section III.C.

In sum, by virtue of this property interest in waters running in definite streams in Oklahoma, it is indisputable that the State also has standing to assert its claims for damages under its theory of trespass (as well as its theories of state law nuisance, federal common law nuisance, and unjust enrichment).

E. The State has not only sufficiently alleged that it has standing, but also established that it indeed does have standing to bring the claims (including the damages claims) it is asserting by virtue of its sovereign interests, its quasi-sovereign / parens patriae interests, and its trustee interests

Defendants have failed to carry their burden in establishing that they are entitled to judgment as a matter of law with respect to the State's standing. The State has plainly demonstrated as a matter of law and fact that it has a broad range of legally protected sovereign, quasi-sovereign / parens patriae, trustee and property interests in the land, water and other natural resources in the IRW in Oklahoma that permit it to prosecute this lawsuit in general, and its damages claims in particular. Tellingly, and fatal for their Motion:

- Defendants have not cited any cases holding that the State does not hold the interests it is claiming in the land, water or other natural resources in the IRW in Oklahoma.

- Defendants have not cited any cases holding that that the common law (including those aspects of the common law pertaining to riparian rights) was not adopted in Indian Territory beginning in 1890.
- Defendants have not cited any cases holding that alienated allotted land is Indian Country.
- Defendants have not cited any cases holding that 60 Okla. Stat. § 60(A) is invalid.
- Defendants have not cited any cases holding that 29 Okla. Stat. § 7-204 is invalid.
- Defendants have come forward with no evidence that the Cherokee Nation claims an exclusive interest in all of the land (including the river and stream beds) of the IRW in Oklahoma.
- Defendants have come forward with no evidence that the Cherokee Nation claims an exclusive interest in all of the water of the IRW in Oklahoma.
- Defendants have come forward with no evidence that the Cherokee Nation claims an exclusive interest in all of the other natural resources (*e.g.*, biota) of the IRW in Oklahoma.
- Defendants have come forward with no evidence that the Illinois River and its tributaries in Oklahoma are navigable for purposes of this lawsuit.
- Defendants have come forward with no evidence that the State does not manage and control the resources of the IRW in Oklahoma that are at issue in this lawsuit.

In fact, Defendants in the *City of Tulsa* litigation argued that similarly situated water resources were owned by the State. In sum, the State has standing.

IV. Conclusion

WHEREFORE, in light of the foregoing, "Defendants' Motion for Judgment as a Matter of Law Based on a Lack of Standing" [DKT #1790] should be denied in its entirety.

Respectfully Submitted,

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IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

THE CITY OF TULSA,
THE TULSA METROPOLITAN
UTILITY AUTHORITY,

Plaintiffs,

v.

TYSON FOODS, INC.,
COBB-VANTRESS, INC.,
PETERSON FARMS, INC.,
SIMMONS FOODS, INC.,
CARGILL, INC.,
GEORGE'S, INC.,
CITY OF DECATUR, ARKANSAS,

Defendants.

Case No. 01-CV-0900B(C) EA

Motion of
SEPARATE DEFENDANT CARGILL INC.'S
and **BRIEF IN SUPPORT OF SUPPLEMENTAL MOTION FOR PARTIAL SUMMARY JUDGMENT**

COMES NOW Separate Defendant Cargill, Inc. (hereinafter "Cargill"), and files this Brief in Support of its Supplemental Motion for Partial Summary Judgment, solely as to Plaintiffs' claim of nuisance.

INTRODUCTION

To maintain an action for nuisance, a party must own the property that is subject to the alleged nuisance. Plaintiffs cannot present proof that they are the owners of the property that is subject to the alleged nuisance. The State of Oklahoma owns the property at issue in Plainiffs' nuisance claim, and Plaintiff City of Tulsa is a mere licensee of a portion of that property. Accordingly, Cargill is entitled to summary judgment as to Plaintiffs' claim for nuisance, and for Plaintiffs' claim for joint and several liability as to nuisance.

EXHIBIT 1

STATEMENT OF UNDISPUTED FACTS RELEVANT TO THIS MOTION

1. Cargill, Inc., contracts with independent growers for the raising of poultry. Amended Complaint ¶18; Deposition of Deryle Oxford, May 16, 2002, pp. 14, 88 (Exhibit A).

2. Cargill's contract growers raise poultry on farms owned by the growers. *Id.* at pp. 14, 88, 192.

3. The City of Tulsa asserts in its Amended Complaint that Cargill has caused pollution to the Eucha/Spavinaw watershed, in the form of nutrients that enter streams and tributaries of Spavinaw Creek, as subsequently collected in Lakes Eucha and Spavinaw. Amended Complaint ¶¶ 15, 16, 19, 20, and 21.

4. The Amended Complaint claims a cause of action for nuisance because of alleged pollution by nutrients. Amended Complaint ¶¶ 47-52.

5. The City of Tulsa has a license from the State of Oklahoma to use a defined portion of the waters of Spavinaw Creek. (Permit, Grant, License and Certificate, Oklahoma Planning and Resources Board, *In the Matter of the Application (Amended) and Supplemented, By the City of Tulsa, a Municipal Corporation, For Appropriation of the Waters of Spavinaw Creek*, No. 22-33, August 9, 1938) (Exhibit "B").

6. Plaintiffs are not the owner of the waters of Spavinaw Creek. *Id.*; *City of Tulsa v. Grand-Hydro*, Case No. 5263, District Court of Mayes County, State of Oklahoma, February 10, 1938 (Exhibit "C").

APPLICABLE LAW

Summary judgment pursuant to Fed. R. Civ. P. 56 is appropriate when "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law."[i]

ARGUMENT

I. The Conduct of Cargill's Contract Growers With Respect to Raising Poultry Does Not Constitute a Nuisance Pursuant to Oklahoma Statute

Oklahoma law defines the raising of poultry as an agricultural activity. 50 O.S. § 1.1. Agricultural activities are specifically exempt from Oklahoma's nuisance law if the activities are performed in a manner that does not have a substantial adverse effect on the public health and safety:

> Agricultural activities conducted on farm or ranch land, if consistent with good agricultural practices and established prior to nearby nonagricultural activities, are presumed to be reasonable and do not constitute a nuisance unless the activity has a substantial adverse affect on the public health and safety.
>
> If that agricultural activity is undertaken in conformity with federal, state and local laws and regulations, it is presumed to be good agricultural practice and not adversely affecting the public health and safety.

50 O.S. § 1.1(B). Cargill's contract growers raise turkeys on farm land. There is no allegation that the contract growers do not utilize good agricultural practices. Under these facts, Cargill's contract growers' agricultural activities "are presumed to be reasonable and do not constitute a nuisance."

The statute excepts from its protection from nuisance suits only those agricultural activities that have "a substantial adverse effect on the public health and safety." Plaintiffs do not allege in the Amended Complaint that the public health and safety is endangered by any action of Cargill or its contract growers.

Furthermore, there is no allegation that Cargill's contract growers are not in conformity with federal, state and local laws and regulations. Without evidence of non-conformity, Cargill's contract growers are presumed by statute to be engaging in "good agricultural practice" and are not "adversely affecting the public health and safety," and thus, their poultry operations cannot constitute a nuisance.

II. Plaintiffs Cannot State a Cause of Action for Nuisance Because Plaintiffs Do Not Have the Requisite Interest In Property

A. The State Of Oklahoma Is the Owner of Spavinaw Creek, and Thereby, the Water That Flows Into Lakes Eucha and Spavinaw

Neither Plaintiff owns the water in Lake Eucha or Lake Spavinaw. The City of Tulsa has permission from the State of Oklahoma to take a certain quantity of water from Spavinaw Creek. The City filed an application with the Oklahoma Planning and Resources Board on May 11, 1922, as amended August 5, 1922, March 23, 1932, and June 13, 1938. (Permit, Grant, License and Certificate, Oklahoma Planning and Resources Board, *In the Matter of the Application (Amended) and Supplemented, By the City of Tulsa, a Municipal Corporation, For Appropriation of the Waters of Spavinaw Creek*, No. 22-33, August 9, 1938)(Exhibit "A")

The City's initial application was to "appropriate the minimum flow" of Spavinaw Creek, and the subsequent amendments expanded the City's request to include "the entire flow of said creek for municipal purposes" and "the excess flow of Spavinaw Creek" for future needs. *City of Tulsa v. Grand-Hydro*, Case No. 5263, District Court of Mayes County, State of Oklahoma, February 10, 1938 at ¶ 1, p. ATK2084 (Exhibit "B"). The City's applications were granted. Id; *see also* Permit, Grant, License and Certificate (reciting history of the construction of Spavinaw reservoir, waterworks and water conduit

to Tulsa) The specific rights of the City of Tulsa to the waters of Spavinaw Creek are as follows:

> IT IS ORDERED AND DECLARED That ... PERMIT, GRANT, LICENSE AND CERTIFICATE is hereby issued to it, its successors, and a grant is made to it, and it is hereby given permission to use and apply forty five cubic second feet of the run-off or flow of said Spavinaw Creek for present needs and necessities for municipal waterworks or supply purposes and such further uses authorized by law...

Id. The Permit, Grant, License and Certificate further finds the City entitled to 205 cubic second feet of Spavinaw Creek for future anticipated needs, "leaving only unappropriated water and water subject to appropriation in the future in said stream system of Spavinaw Creek one hundred fifty-five cubic second feet." *Id.*

The terms used by the Oklahoma Planning and Resources Board are unequivocal: the City was granted license to utilize a certain portion of the flow of Spavinaw Creek. Title and ownership of the water itself did not transfer—only the right to use the water was transferred from the State of Oklahoma.

B. Plaintiffs Cannot State a Claim for Nuisance Because They Do Not Own the Property Subject to the Alleged Nuisance

"A nuisance, public or private, arises where a person uses his own property in such a manner as to cause injury to the property of another." *Fairlawn Cemetery Ass'n v. First Presbyterian Church*, 496 P.2d 1185 (Okla. 1972). Plaintiffs are not the owners of the waters of Spavinaw Creek; they are simply licensees of the State of Oklahoma.

As mere licensees, Plaintiffs cannot enforce the rights of a property owner that is subject to an alleged nuisance.

> The statutory definition of nuisance --in 50 O.S.1991 §§ 1 et seq.— encompasses the common law's private and public nuisance concepts. It abrogates neither action. Common-law nuisance --a field of tort-like liability which allows recovery of damages for wrongful interference with

> the use or enjoyment of rights or interests in land-- affords the means of recovery for damage incidental to the land possessor's person or chattel.

Nichols v. Mid-Continent Pipe Line Co., 933 P.2d 272 (Okla. 1996). The State of Oklahoma is the "possessor" in this case, with the City a licensee for a particular portion of the State's property. The action of nuisance is the "means of recovery for damage incidental" to the property of the State of Oklahoma.

As discussed in the joint Motion for Summary Judgment of the Poultry Defendants, Plaintiffs cannot recover under nuisance for claims of personal injury, such as annoyance and discomfort, because those types of damage can only be suffered by people, not corporate or government entities. Corporate or government entities can only recover for damage to their property. "*Tytenicz*, *Eylar*, *Kiser*, *Slape*, and *Lowe*, make inescapable the conclusion that the cause of action for inconvenience, annoyance, and discomfort is one for personal injury and is separate and distinct than the cause of action for damages to property, although the right to both may arise in a suit for nuisance." *Truelock v. Del City*, 967 P.2d 1183 (Okla. 1998).

C. As Licensees, Plaintiffs Can Only Claim that Cargill Has Interfered With the City's Right To Take Its Assigned Quantity of Water, a Claim That Plaintiffs Do Not Allege

The terms of the City's license with the State do not include provisions relating to any aspect of water other than quantity. Because the license is silent as to issues such as warranties of water quality or clarity, Plaintiffs cannot argue that any contractual rights are injured by virtue of the alleged nuisance. Plaintiff City of Tulsa has a license to use a fixed quantity of water, and Plaintiffs do not allege that Cargill has done any act to interfere with the City's taking of its fixed quantity of water. Thus, even if Plaintiffs could sustain a nuisance claim as to property that they do not own, Plaintiffs can allege

only that harm commensurate with the City's license to utilize water as licensed by the State.

CONCLUSION

Plaintiffs allege numerous causes of action with respect to their basic complaint: the water they take from Lakes Eucha and Spavinaw has more algae in it than usual. Plaintiffs' allegation of nuisance against Cargill fails for multiple reasons. The agricultural practices of Cargill's contract growers are protected from nuisance claims by statute. Furthermore, Plaintiffs do not have the right to assert an action for nuisance to property that is not theirs.

WHEREFORE Defendant Cargill, Inc. respectfully requests that the Court grant summary judgment to Cargill, Inc. as to Plaintiffs' claim for nuisance, and for Plaintiffs' claim for joint and several liability as to nuisance, and for such other relief as the Court finds appropriate.

---

[1] *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *LMS Holding Co. v. CoreMark Mid-Continent, Inc.*, 50 F.3d 1520, 1523 (10th Cir. 1995). Indeed, the purpose of the summary judgment rule is to determine whether trial is necessary; thus the non-moving party must at a minimum direct the court to facts which establish a genuine issue for trial. *White v. York Int'l Corp.*, 45 F.3d 357, 360 (10th Cir. 1995). In *Celotex*, the Supreme Court stated:

> The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

Celotex, 477 U.S. at 317. To survive a motion for summary judgment, the nonmovant must establish that there is a genuine issue of material fact, but he also "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita v. Zenith*, 475 U.S. 574, 585 (1986).

With respect to Rule 56 motions, the Tenth Circuit Court of Appeals has stated:

> Summary judgment is appropriate if 'there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.' . . . Factual disputes about immaterial matters are irrelevant to a summary judgment determination . . . . We view the evidence in a light most favorable to the nonmovant; however, it is not

> enough that the nonmovant's evidence be 'merely colorable' or anything short of 'significantly probative.'
>
> . . .
>
> A movant is not required to provide evidence negating an opponent's claim . . . . Rather, the burden is on the nonmovant, who 'must present affirmative evidence in order to defeat a properly supported motion for summary judgment.' . . . After the nonmovant has had a full opportunity to conduct discovery, this burden falls on the nonmovant even though the evidence probably is in the possession of the movant.

Committee for the First Amendment v. Campbell, 962 F.2d 1517, 1521 (10th Cir. 1992) (citations omitted). Thus, if the non-moving party fails to set forth specific facts showing a genuine issue for trial, the moving party is entitled to judgment as a matter of law, and the court's grant of summary judgment will not be disturbed on appeal. *Devery Implement Co. v. J.I. Case Co.*, 944 F.2d 724, 726-27 (10th Cir. 1991).

Respectfully submitted,

RHODES, HIERONYMUS, JONES, TUCKER & GABLE, P.L.L.C.

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CERTIFICATE OF SERVICE

I hereby certify that I have this 7th day of November, 2002, mailed a true and correct copy of the above and foregoing document with proper postage prepaid thereon to:

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1790-1

EXHIBIT
A

Transcript of the Testimony of
Deryle Oxford

Date: May 16, 2002
Volume: I

Case: City of Tulsa v. Tyson, et al.
01-CV-0900B(X)

COPY

City Reporters, Inc.
Phone: (405) 235-3376
Fax: (405) 235-3392
Email: lkemp@okcityreporters.com
Internet: www.okcityreporters.com

A I communicated with a Tim Alsup.
Q All right. Tim Alsup.
What does Tim Alsup do for Cargill, Inc.?
A He has worked with the producers in the past, but currently works a lot like Tim Mothen, except in the northwest Arkansas area.
Q All right.
A But he was more importantly responsible for putting together much of the information that we needed for this, for your request.
Q Okay. Mr. Alsup helped pull together some documents that Cargill, Inc. produced to the plaintiffs in this lawsuit?
A Yes, sir.
Q You said that Mr. Alsup used to work with the producers, quote-unquote?
A Yes, sir.
Q What -- when you use the word "producers", what are you referring to?
A The people that grow the turkeys.
Q All right.
A The independent farmers.
Q Okay. Mr. Alsup was some kind of supervisor there with the independent growers?
A That's what we call grow-out manager.

Q All right. Is that written down somewhere what your minimum requirements are?
A In some locations it's written down. I -- I don't think it is in all locations.
Q How about your location? Do you have -- you're the supervisor. Do you have a book or something that writes down kind of generally what you're expecting the farmer to -- to invest in the operation as time goes along? Are you following what I'm saying?
A We don't have an estimate of how much he should invest as time goes on.
Q Do you have a minimum requirement as time goes on?
A No, sir. Just to have the houses maintained at a certain level.
Q If the farmer wants to sell his farm to another grower, is that normally what happens, if they want to get out of the business? They want to sell it to some other grower?
A Certainly.
Q Okay. And how does that process work? Do they contact you and say, I want to sell my farm to Johnny Jones?
A It happens in all sorts of ways. Sometimes

with the litter, why Cargill, Inc. wouldn't do that? Is that a bad question? Do you want me to start --

A It was a long one, but --

Q Yeah, I'm bad at that. Let me start over.

Cargill, Inc. dictates a lot of specific requirements to contract growers, does it not? Do you agree with that?

A In the management of their farm?

Q Yes.

A I don't know that I agree with you on that.

Q Really? You don't -- you don't think that the contract and the way the process is set up is set up --

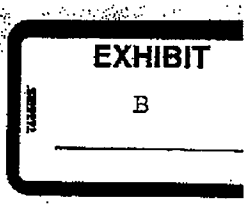
A Those -- that doesn't affect the way they manage their farms.

Q The requirements in the contract, what they have to do, the weekly visitations by Cargill, does not affect the management of the farm?

A The weekly -- the weekly visitation is not something we ask the grower to do.

Q I understand, but don't you make requirements of those growers when you see things that are wrong?

A We only make requirements whenever we think that it's going to affect the residues, the rules



PROCEEDINGS IN APPLICATION

FOR

SPAVINAW WATER RIGHTS

BEFORE THE OKLAHOMA PLANNING AND RESOURCES BOARD OF THE STATE OF OKLAHOMA

IN THE MATTER OF THE APPLICATION (AS AMENDED) AND SUPPLEMENTED, BY THE CITY OF TULSA, A MUNICIPAL CORPORATION, FOR APPROPRIATION OF THE WATERS OF SPAVINAW CREEK.	))))	No. 22-33.

PERMIT, GRANT LICENSE AND CERTIFICATE

On the 9th day of August, A.D. 1938, there came on for hearing and consideration before the Oklahoma Planning and Resources Board of the State of Oklahoma (hereinbelow referred to as Commission) at its offices in the State Capitol Building, in Oklahoma City, Oklahoma, the original application of the City of Tulsa, a municipal corporation, filed in the office of the State Engineer, Department of Highways of the State of Oklahoma, on May 11, 1922, and the amended application of said City of Tulsa filed in the same office on August 5, 1922, to which amended application there was appended maps, plans, etc., illustrating the nature of the proposed waterworks to be constructed by said City in its appropriation of the waters of Spavinaw Creek in Oklahoma for municipal waterworks or supply purposes and, the supplemental application of said City filed in the office of the Conservation Commission of the State of Oklahoma on March 23, 1932, and the amendment of said City to said application filed with said Commission on June 13, 1938, all pursuant to and by virtue of the provisions of Chapter 70 of the Oklahoma Statutes 1931 (being Chapter 40, Volume 1, Revised Laws of Oklahoma 1910), and Chapter 119, House Bill No. 63, Session Laws of Oklahoma 1923-1924 (being Sections 6056 to 6059 both inclusive, Oklahoma Statutes 1931), and the said City of Tulsa appearing by H. O. Bland, City Attorney, Harve N. Langley, special assistant to said City Attorney, and W. F. Graham, Water Commissioner of said City, and, whereupon, the said Commission ordered a continuance of said hearing of said matter to September 13, 1938, at 10 o'clock A.M., and further ordered the giving of notice of said hearing on said application, as amended and supplemented, to the Grand River Dam Authority, the Grand-Hydro, a corporation, The City of Muskogee, The City of Wagoner, the City of Pryor Creek, the Town of Ft. Gibson, The Oklahoma Hydro-Electric Company, a corporation, T. C. Bowling, Cedar Crest Lakes, an Oklahoma Express Trust, the City of Vinita, and the City of Miami.

NOW, on this 13th day of September, 1938, at the hour of ten o'clock A.M., at the offices of said Commission, in the State Capitol Building, in Oklahoma City, Oklahoma, the aforesaid application, as amended and supplemented as stated hereinbefore, comes on for hearing and consideration before said Commission, the said City of Tulsa again appearing by H. O. Bland, City Attorney, Harve N. Langley, special assistant to said City Attorney, and W. F. Graham, Water Commissioner of said City, and no person, firm or corporation or municipal corporation appearing in opposition to the granting of said application as amended and supplemented.

Thereupon, the said City of Tulsa files with said Commission due and sufficient proof of the service of the notice issued by said Commission on August 9th, 1938, upon each of the following: The Grand River Dam Authority, The Grand-Hydro, a corporation; The City of Muskogee, The City of Wagoner, The City of Pryor Creek, The Town of Fort Gibson, The Oklahoma Hydro-Electric Company, a corporation, T. G. Bowling, Cedar Crest Lakes, an Oklahoma express trust, The City of Vinita, and the City of Miami, and which service of notice, the said Commission doth approve and declare sufficient.

WHEREUPON, The City of Tulsa, a municipal corporation, submits evidence in support of its said application as amended and supplemented, and, from which evidence, the said Commission finds and declares and adjudges:

(1) That pursuant to the amended application aforementioned filed on August 5th, 1922, The State Engineer, Department of Highways of the State of Oklahoma on the 18th of August, 1922, issued notice of hearing of said amended application, and, which notice was duly published in a newspaper printed in and of general circulation in the stream area, namely, Mayes County Democrat, a weekly newspaper published in the City of Pryor, Oklahoma, in the issues of said newspaper published on dates, i.e., September 14, 1922, and continuing weekly, the last publication being on October 12, 1922, and due proof of such publication filed with said State Engineer immediately upon completion of the last such publication; and, on October 18, 1922, at ten o'clock A.M., at the office of the said State Engineer, in the said State Capitol Building, said application as amended was heard, and the said City of Tulsa submitted evidence, and its specifications and plans for the construction of the works proposed; and by said amended application said City sought to appropriate and did appropriate forty-five cubic second feet of the run-off or flow of said Spavinaw Creek for municipal waterworks or

supply purposes; and, said State Engineer took under consideration said application as amended until the 28th of November, 1922, when he endorsed on the upper right hand corner of the first page of said amended application the following: "Approved for entire flow. 11/28/1922. Max L. Cunningham, State Engr."

Thereupon, in diligent manner, pursuant to such approval of said application as amended, and said appropriation, and in keeping with the maps, plans and specifications so submitted, said City of Tulsa did actually, as a matter of fact, and as a matter of record, appropriate and apply to beneficial uses, i.e., municipal waterworks or supply purposes forty-five cubic second feet of the run-off or flow of said Spavinaw Creek, beginning in the month of April, 1924, after its construction of the proposed works consisting of a dam of reinforced concrete and concrete core-wall located in Section fifteen, Township Twnety-two North, Range twenty-one East of the Indian Base and Meridian, in Mayes County, Oklahoma, said point being definitely located on the map appended to said amended application, which dam raised the elevation of the water from six hundred thirty feet above sea level to the impounded elevation of six hundred eighty feet above sea level, thereby inducing a gravity flow through a reinforced concrete conduit from the point of said dam to a point near the City of Tulsa, and at said latter point said City constructed an emergency storage reservoir, and other appendages and incidents necessary to the plan of the proposed works, and, said City of Tulsa has, for such beneficial purposes, continuously since April, 1924, been diverting and actually applying to such uses, the said appropriated quantity of the run-off or flow of said Spavinaw Creek, i.e., forty-five cubic second feet.

That on March 23, 1932, said City of Tulsa filed with the Conservation Commission of the State of Oklahoma, its supplement to said application for the appropriation of the unappropriated waters of said Creek for such beneficial purposes and uses, pursuant to the provisions of Chapter 119, House Bill No. 63, Session Laws of Oklahoma 1923-24 (being Sections 6056 to 6059, both inclusive, of Oklahoma Statutes 1931) for its future needs and necessities; and, on June 13th, 1938, said City filed a supplement to said application for appropriation for its said future needs and necessities for such purposes of two hundred five cubic second feet of the run-off or flow of said Spavinaw Creek.

That subsequent to March 23, 1932, the Conservation Commission of the State of Oklahoma and this Commission caused to be conducted, and did conduct and complete an hydrographic survey of said Spavinaw Creek and of Grand River in Oklahoma, by which said survey it was accurately determined and recorded the run-off or flow of said Spavinaw Creek.

That on February 14, 1938, the District Court of Mayes County, Oklahoma, in an action entitled: The City of Tulsa, a municipal corporation, plaintiff, versus Grand-Hydro, a corporation, and others, defendants, did render judgment adjudging the run-off or flow of said Spavinaw Creek to be four hundred five cubic second feet, and did further adjudge said Spavinaw Creek to be a separate stream system, and did further adjudge that no person, firm, or corporation, or municipal corporation, save the City of Tulsa, had applied for permit, grant license or certificate to appropriate the waters of said creek to beneficial uses and/or had actually applied the waters of said Spavinaw Creek or any part thereof to beneficial uses.

That on June 13, 1938, the Oklahoma Planning and Resources Board of the State of Oklahoma, issued notice of the hearing of said application, as amended and supplemented as aforesaid of said City of Tulsa, and which said notice was duly published in the Delaware County Journal, published at Jay, the county seat of Delaware County, Oklahoma, being a newspaper published weekly and of general circulation and printed in the stream area of Spavinaw Creek and which said notice was published in the issues of said newspaper to-wit, June 30, 1939, July 7th, July 14th, and July 21, 1938, and due and sufficient proof of said publication filed with said Commission on August 9, 1938.

That the run-off or flow of said Spavinaw Creek as disclosed by said hydrographic survey and the judgment of said District Court, and as a matter of fact, is four hundred five cubic second feet.

The said Spavinaw Creek has its source in Arkansas, and flows through Delaware County, Oklahoma, into Mayes County, Oklahoma, where it empties into Grand River.

That the City of Tulsa, a municipal corporation, is first in point of time in filing application for the appropriation of said forty-five cubic second feet for such uses for present needs, and is first in point of time in filing application for the appropriation of two hundred five cubic second feet for its future needs and necessities for such purposes.

That the City of Tulsa, a municipal corporation, diligently pursued and prosecuted its said application as amended and supplemented as aforesaid, and diligently constructed the works in connection therewith as proposed, and diligently applied the appropriated forty-five cubic second feet of the run-off or flow of said Spavinaw Creek to such uses for present needs and necessities, and, that the works constructed as aforementioned are in accordance with its said plans and specifications, and in keeping with standard engineering, and the same is safe, and should be approved by this Commission, and certificate of completion thereof issued by this Commission.

That to meet the future needs and necessities of said City of Tulsa, it is necessary that said City appropriate in addition to said forty-five cubic second feet of the run-off of said Spavinaw Creek now being actually applied to such uses, two hundred five cubic second feet, for the aforesaid beneficial uses, and that said two hundred five cubic second feet of the run-off or flow of said Spavinaw Creek should be by this Commission or Board set aside as a reserve for said City of Tulsa to be used and applied when needed by said City of Tulsa for such uses.

And, the Oklahoma Planning and Resources Board of the State of Oklahoma, hereinbefore referred to as Commission and Board, being fully informed in the premises:

IT IS ORDERED AND DECLARED That all things have been dine, performed, and happened required by law and the rules of said Board by the City of Tulsa in its appropriation of forty-five cubic second feet of the run-off or flow of said Spavinaw Creek for aforementioned purposes, and PERMIT, GRANT, LICENSE AND CERTIFICATE is hereby issued to it, its successors, and a grant is made to it, and it is hereby given permission to use and apply forty five cubic second feet of the run-off or flow of said Spavinaw Creek for present needs and necessities for municipal waterworks or supply purposes and such further uses authorized by law now existing or hereafter enacted, and the aforementioned works in connection with such appropriation by it constructed and is hereby approved, and declared safe, and declared constructed according to standard engineering, and certification of completion of such works is hereby issued.

IT IS ORDERED AND FURTHER DECLARED That all things have been done, performed and happened required by law and the rules of said Board

by the said City of Tulsa in its appropriation of two hundred five cubic second feet of the run-off or flow of Spavinaw Creek to be by it used and applied in the future to meet its anticipated future needs for such purposes i.e., municipal waterworks or supply purposes and such further uses authorized by law now existing or hereafter enacted, and, said quantity of the run-off or flow of said creek is hereby set apart and reserved for said City of Tulsa for such uses in the future, and permit, grant, license, is hereby issued to said City of Tulsa for such purposes of such quantity of the run-off or flow of said Spavinaw Creek for such future needs and necessities, leaving only unappropriated water and water subject to appropriation in the future in said stream system of Spavinaw Creek one hundred fifty-five cubic second feet.

IT IS ORDERED AND FURTHER DECLARED That the appropriation by the City of Tulsa of the aforesaid two hundred fifty cubic second feet is superior and prior to the Grand River Dam Authority, The Grand-Hydro, a corporation, The City of Muskogee, The City of Wagoner, The City of Pryor Creek, The Town of Fort Gibson, The Oklahoma Hydro-Electric Company, T. C. Bowling, Cedar Crest Lakes, The City of Vinita, and the City of Miami.

WITNESS the Oklahoma Planning and Resources Board of the State of Oklahoma, by its Chairman and Secretary, with the Seal of said Board affixed, at its offices in the State Capitol Building in Oklahoma City, Oklahoma, this thirteenth day of September, A.D. 1938.

THE OKLAHOMA PLANNING AND RESOURCES BOARD OF THE STATE OF OKLAHOMA,

BY /s/ G. W. Archibald
Vice-Chairman

ATTEST:

T. G. Gammie
Secretary

(SEAL)

CERTIFICATE OF TRUE COPY OF ORIGINAL

******

United States of America;)
State of Oklahoma)
Oklahoma County)

The undersigned, whose title is written below his signature, being the officer of the OKLAHOMA PLANNING AND RESOURCES BOARD OF THE STATE OF OKLAHOMA having custody of the records, files and documents of said Board does hereby certify that the foregoing seven typewritten pages is a true and correct copy of the original thereof on file in said Board, the original being the Permit, Grant, License and Certificate issued by said Board to the City of Tulsa, a municipal corporation, in relation to the application as amended and supplemented of said City of Tulsa for the appropriation of the waters of Spavinaw Creek Stream System, being file No. 22-23 of said Board.

Witness the hand of said officer, with the seal of said Board affixed, at his office, in Oklahoma City, Oklahoma, in the State Capitol Building, on this thirteenth day of September, A.D. 1938.

T. G. Gammie
Secretary

(SEAL)

EXHIBIT
C

IN THE DISTRICT COURT OF MAYES COUNTY, OKLAHOMA

CITY OF TULSA, a municipal corporation,
Plaintiff,
vs. No. 5263
GRAND-HYDRO, a corporation, et al.,
Defendants.

D E C R E E

Now on this 10th day of February, 1938, the above styled cause came on regularly for hearing. The plaintiff appeared by its City Attorney, H. O. Bland, and by special counsel Harve N. Langley; the defendant Grand-Hydro, a corporation, appeared by its president and attorney of record W. E. Hudson; the City of Muskogee, a municipal corporation, appeared through its attorney William Rampendahl; the City of Wagoner, a municipal corporation appeared by its attorney W. O. Mattenhouse; the City of Pryor Creek, a municipal corporation, appeared by its attorney Ernest R. Brown; the Town of Fort Gibson, a municipal corporation, appeared by its attorney, Q. B. Boydston; the Oklahoma Hydro-Electric Company, a corporation, appeared by its attorney Wilbur J. Holleman; the Defendant T. C. Bowling appeared in person; Cedar Crest Lakes Company, an Oklahoma express trust, appeared by its attorney Maurice F. Ellison; the defendant Grand River Dam Authority appeared by its general counsel R. L. Davidson and its associate counsel Jack L. Rorschach; the State of Oklahoma and the Oklahoma Planning and Resources Board appeared through Randell S. Cobb, Assistant Attorney General of the State of Oklahoma; the City of Vinita, a municipal corporation, appeared by its attorney W. T. Rye; the City of Miami was not represented by attorney, having filed an answer that it did not now nor has it at any time past used any of the waters belonging to Grand River or any of its tributaries. All of the parties present announced ready for trial except the defendant Oklahoma Hydro-Electric Company, which asked for a postponement of the trial. The request was withdrawn under an agreement made in open court that after the other parties desiring to introduce evidence had closed their testimony, the

Oklahoma Hydro Electric Company should have the privilege if it so desired at that time, of delaying the trial two days, for the purpose of amending its answer and introducing its evidence. Thereupon, the City of Tulsa, introduced its evidence, after which the defendants the City of Muskogee, The City of Wagoner, the City of Pryor Creek, the Town of Fort Gibson, the Grand-Hydro, Cedar Crest Lakes Company and T. C. Bowling and Grand River Dam Authority introduced their evidence. The introduction of evidence by all parties other than the Oklahoma Hydro Electric Company having been concluded the Oklahoma Hydro-Electric Company claimed its right under the agreement made in open court, to a delay of the trial for two days, which claim the court indicated would be allowed, but it was agreed in open court that further hearing of the cause would be continued until February 12, 1938, at 9:00 a.m., at which time the hearing of the cause would be resumed unless the Oklahoma Hydro- Electric Company at that time was not ready to proceed in which event, the further was to be further continued until February 14, 1938. Prior to convening of the court on February 12, 1938, the Oklahoma Hydro-Electric Company advised the Court that it would not be ready to resume the hearing of the cause on February 12th, but would be ready to resume the same on February 14th. Upon convening of the Court on February 12th, further hearing of the cause was continued by the Court until 5:00 o'clock P.M. February 14, 1938, and the further hearing of the cause was resumed at 5:00 o'clock P.M. on February 14, 1938, and the Oklahoma Hydro-Electric Company introduced its evidence and the Grand River Dam Authority and the Grand-Hydro introduced their rebuttal evidence.

Thereupon, the court having heard all the evidence, and the argument of counsel, and being fully advised in the premises finds and adjudges:

1. That Spavinaw Creek is a separate and distinct stream system from that of Grand River, although it is a tributary of Grand River; that the average flow of Spavinaw Creek is 450 cubic feet per second; that the City of Tulsa has actually appropriated to a beneficial use for municipal purposes, 45 cubic second feet per second of the flow of said creek; that there is now unappropriated in the flow of said creek 405 cubic second feet per second; that the City of Tulsa is diverting from the flow of said creek approximately 45 cubic second feet per second, and conveying the same through a conduit line to the City of Tulsa for municipal purposes; that the point of diversion is at the town of Spavinaw, where the City of Tulsa constructed a dam

impounding approximately 31,000 acre feet of water, and that the diversion of said water actually began in April 1924, which diversion has been continuous ever since; that on May 11, 1922, the City of Tulsa filed its application with the State Engineer of the State of Oklahoma for a permit to appropriate the minimum flow of said creek (45 cubic feet per second) to a beneficial use, to-wit; a municipal water supply, and on the 5th day of August, 1922, the City of Tulsa filed its amended application with the State Engineer of the State of Oklahoma for a permit to appropriate the minimum flow of said creek for the same purpose; that the State Engineer fixed a day certain for the hearing of said application and amended application, and directed that notice of said hearing to be given as provided by law; that due notice of said hearing was given, and on the 28th day of November, 1922, the State Engineer issued a permit to the City of Tulsa and approved its applications for the appropriation of the entire flow of said creek for municipal purposes; that thereafter the City of Tulsa, on March 23, 1932, filed with the Conservation Commission of Oklahoma an amendment to its applications seeking to appropriate the excess flow of Spavinaw Creek over and above the 45 cubic feet per second already applied for, to meet future needs of the City of Tulsa for waterworks purposes; that no person, firm or corporation, other than the City of Tulsa has ever applied for the right to appropriate the Waters of Spavinaw Creek to a beneficial use, or actually applied the waters of said creek to a beneficial use; that the City of Tulsa has been diligent in the appropriation of said waters for municipal use and purposes and has been diligent in the prosecution of its application for a permit to appropriate said waters for said purpose, and is prior in point of time to other persons, firms and corporations in making application to the proper authorities for such permit.

2. That on the 14th day of July, 1931, the defendant Grand-Hydro a domestic corporation, filed with the Conservation Commission of the State of Oklahoma its application in due form for a permit to appropriate 4,000 cubic feet per second of the flow of Grand River for the purpose of generating electricity energy and power; that the Commission fixed a day certain for the hearing of said application, and directed that notice of said hearing be given as provided by law; that said notice was duly given, and on the 29th day of August, 1931, the said Commission issued to the Grand-Hydro a permit to appropriate to a beneficial use (the generation of electric energy and power)

4,000 cubic feet per second of the flow of Grand River; that under the authority of said approved application, Grand-Hydro proceeded with diligence to acquire one or more dam sites for the purpose of constructing a dam to impound the waters of Grand River for use in the generation of electric energy and power, and in making extensive engineering investigations and surveys, and in the acquisition of lands in the basin area of the reservoir, which would be inundated by the impounded waters, but the Court finds and adjudges that the Grand-Hydro did not construct any works or facilities through which to utilize the waters of said river for the purpose of generating electric energy or for any other beneficial use, and did not actually apply and has never actually applied or appropriated any of the waters of said river to a beneficial use, and does not now have any right to apply or appropriate any of the waters of said river to any beneficial use, but that if Grand-Hydro acquired any rights under its said approved application, it has transferred and conveyed the same to the Grand River Dam Authority by virtue of its assignment of January 10, 1938.

3. The Court further finds and adjudges that on the 20th day of February, 1932, the City of Pryor Creek filed its application with the Conservation Commission of Oklahoma for a permit to appropriate .375 cubic feet per second of the flow of Grand River to meet its present need for municipal waterworks purposes and .75 cubic feet per second of the flow of said river for its future needs; that the Commission fixed a day certain for the hearing of said application, and directed that notice thereof be given as provided by law; that such notice was duly given, and on the 14th day of April, 1932, the said Commission issued to the City of Pryor Creek its permit to appropriate for municipal purposes .375 cubic feet per second of the flow of said river for its waterworks system and began taking its water supply from Grand River in 1910, and has used the waters of Grand River for that purpose continuously ever since; that the point of diversion is near the northwest corner of Section 12, Township 20 North, Range 19 East, in Mayes County, Oklahoma.

4. The Court further finds and adjudges that on the 29th day of February, 1932, the City of Muskogee filed its application with the Conservation Commission for a permit to appropriate 30 cubic feet per second of the flow of Grand River for municipal purposes; that the Commission fixed a day certain for the hearing of said application and directed that notice thereof be given as provided by law; that such notice was duly given, and

on the 4th day of April, 1932, the said Commission issued to the City of Muskogee a permit to appropriate 30 cubic feet per second of the flow of said river for municipal purposes; that the City of Muskogee began using the water of Grand River for municipal purposes prior to statehood and at statehood was using said waters at the rate of 5 cubic feet per second, and has continuously used the same for such purposes ever since, and is now using the waters of said river for such purpose to the extent of 25 cubic feet per second; that the point of diversion by the City of Muskogee is approximately 1300 feet above the confluence of Grand River with the Arkansas River; that the waterworks system of the City of Muskogee was constructed and operated prior to statehood and has been operated in its present condition since 1913.

5. The Court further finds and adjudges that on March 3, 1932, the City of Vinita filed its application with the Conservation Commission for a permit to appropriate 5 cubic feet per second of the flow of Grand River for municipal purposes; that the Commission fixed a day certain for the hearing of said application, and directed that notice be given thereof as provided by law; that such notice was duly given and on the 8th day of April, 1932, said Commission issued to the City of Vinita a permit to appropriate 5 cubic feet per second of the flow of Grand River for municipal purposes; that the said City constructed its waterworks system and began the diversion of 5 cubic feet per second of the flow of said river for municipal purposes in 1922, at a point on said river in Section 2, Township 23 North, Range 21 East in Mayes County, Oklahoma, and has ever since continuously used the waters of said river for municipal purposes to that extent.

6. The Court further finds and adjudges that on the 9th day of March, 1932, the City of Wagoner filed its application with the Conservation Commission for a permit to appropriate 4 cubic feet per second of the flow of Grand River for municipal purposes; that the said Commission fixed a day certain for the hearing of said application, and caused notice of said hearing to be given as provided by law, and on the 14th day of April, 1932, said Commission issued to the City of Wagoner a permit to appropriate four cubic feet per second of the flow of Grand River for municipal purposes; that the said City began using said waters of said river for such said municipal purposes

prior to statehood, and at the time of statehood was using said waters at the rate of 2 cubic feet per second for present needs, and has asked in its application for an additional 2 cubic feet per second for its future needs; that the diversion of said waters from said river by the City of Wagoner began in 1903 and has been continuous ever since; that the point of diversion is located 534 feet north and 890 feet east of the southwest corner of the Northwest Quarter (NW¼) of Section 20, Township 18 North, Tange 19 East of the Indian Base and Meridian, in Wagoner County, Oklahoma.

7. The court finds and adjudges that on the 24th day of March, 1932, Cedar Crest Lakes Company, an Oklahoma Express Trust, filed its application with the Conservation Commission for a permit to appropriate 500 acre feet of the flow of Spring Creek, a tributary of the Grand River in Mayes County, for the purpose of recreation and fish culture; that the said Commission fixed a day certain for the hearing of said application, and caused notice thereof to be given as provided by law, but that no permit was ever issued to Cedar Crest Lakes Company by the Commission, nor has any further action been taken on said application; that during the year 1932 the Cedar Crest Lakes Company constructed a dam across Spring Creek inundating 110 acres of land located in Section 34, Township 19 North, Range 19 East, and Sections 18 and 19, Township 19 North, Range 20 East, in Mayes County, Oklahoma, and has continuously maintained said dam to this date, and devoted the water thus impounded to recreation and fish culture.

8. The court finds and adjudges that long before statehood the Town of Fort Gibson began using the waters of Grand River for municipal purposes, and on the advent of statehood was using 1.543 cubic feet per second of the flow of said river for such purposes, and is now and has been continuously since statehood, using 1.543 cubic feet per second of the flow of said river for such purposes, but has never filed any application with the State Engineer, the Conservation Commission, or the Oklahoma Planning and Resources Board, for a permit to appropriate any of the waters of said River for municipal or other beneficial use; that the point of diversion is located in Section 2, Township 15, North, Range 19 East, in Muskogee County, Oklahoma.

9. The court further finds and adjudges that on June 19, 1922, the Grand River Hydro Electric Company, a corporation, filed its application with the State Engineer for a permit to appropriate the entire flow of Grand River at a point located 1154 feet north and 87 feet west of the Southeast

corner of Section 15, Township 23 North, Range 21 East, in Mayes County, Oklahoma, Dam No. 1, for the purpose of generating electric energy and power; that the State Engineer fixed a day certain for the hearing of said application, and directed that notice thereof be given as provided by law; that such notice was duly given and on the 23rd day of September, 1922, the State Engineer endorsed on said application his approval thereof; that on June 18, 1923, the Grand River Hydro-Electric Company, a corporation, filed its applications (3) with the State Engineer to appropriate the entire flow of Grand River for the purpose of generating electric energy at three points on the river (for dam No. 2 at a point located 2640 feet north and 1320 feet west of the Southeast Corner of Section 4, Township 21 North, Range 20 East, in Mayes County; and for Dam No. 4 at a point located 2640 feet south and 650 feet West of the northeast corner of Section 22, Township 17 North, Range 19 East, in Cherokee and Wagoner counties); that the State Engineer fixed a day certain for the hearing of said applications, and caused notice thereof to be given as provided by law, and on July 1, 1924, endorsed on said applications his approval thereof; that the Oklahoma Hydro-Electric Company has acquired by mesne assignments and transfers, whatever rights the Grand River Hydro-Electric Company ever had or possessed by virtue of filing of said applications and the State Engineer's approval thereof, but the Court finds and adjudges that neither the Grand River Hydro-Electric Company nor the Oklahoma Hydro-Electric Company, nor any other person, firm or corporation claiming rights under the approved applications of Grand River Hydro-Electric Company, ever constructed any works or facilities through which to use any of the waters of said river for the purpose of generating electric energy or for any other beneficial use; that neither the said Grand River Hydro-Electric Company nor the Oklahoma Hydro-Electric Company, nor any one claiming rights under the approved applications of the Grand River Hydro-Electric Company used due diligence in the appropriation of the waters of said river, to a beneficial use, or used due diligence in prosecuting said applications, or any of them, and that the Grand River Hydro-Electric Company and its assignees, including the Oklahoma Hydro-Electric Company, have abandoned the proceedings instituted by the Grand River Hydro-Electric Company to acquire the right to appropriate the waters of said river to a beneficial use; that the Grand

River Hydro-Electric Company failed to pay its corporation license taxes, for which reason its charter was forfeited by the State in 1934, and it ceased to be a corporation and does not now and has not since 1934 possessed any corporate powers, but the Court finds that before the forfeiture of the charter, the Grand River Hydro-Electric Company assigned and conveyed all of its rights to the persons who later transferred and assigned such rights to the Oklahoma Hydro-Electric Company, and the Court finds and adjudges that the Oklahoma Hydro-Electric Company, has no right to appropriate any of the waters of the Grand River to any beneficial use, and that no person, firm or corporation has any right to appropriate any of the waters of Grand River to any beneficial use under or by virtue of the approved applications of the Grand River Hydro-Electric Company; that if any rights ever existed under said approved applications, they have been abandoned and forfeited and ceased to exist prior to the enactment of Article 4, Chapter 70, of the 1935 Session Laws of the State of Oklahoma, creating the Grand River Dam Authority and appropriating to it the entire flow of the Grand River and conferring upon it the right to control, store, preserve and use the waters of said river for the beneficial purposes specified in said Act.

10. The Court further finds and adjudges that the Oklahoma Hydro-Electric Company has never applied to the State Engineer, the Conservation Commission, or the Oklahoma Planning and Resources Board, or any other state authority, for any permit to appropriate any of the waters of Grand River to a beneficial use, and has never actually applied or appropriated any of said waters to a beneficial use, and does not now have any right to appropriate any of the waters of said river to a beneficial use.

11. The Court finds and adjudges that the City of Miami has never applied to the State Engineer, the Conservation Commission, or the Oklahoma Planning and Resources Board, or any other state authority for a permit to appropriate any of the waters of Grand River to a beneficial use, and has never actually applied or appropriated any of the waters of said river to a beneficial use, and does not now have any right to appropriate any of the waters of said river to a beneficial use.

12. The Court finds and adjudges that on September 25, 1931, the defendant T. C. Bowling filed his application with the Conservation Commission for a permit to appropriate 550 acre feet of the flood flow of

Mayes Branch, a tributary of Grand River in Mayes County, Oklahoma, for the purpose of fish culture and irrigation, and on February 20, 1932, the said defendant filed with said Commission an amended application for a permit to appropriate 550 feet of the flow of said Mayes Branch for the same purposes; that the said Commission fixed a day certain for the hearing of said application and amended application, and caused due notice thereof to be given as provided by law; that on March 26, 1932, the said Commission issued to said defendant a permit to appropriate the said 550 acre feet of the flow of Mayes Branch for said purposes; that the said defendant on or about the 26th day of March, 1932, constructed a concrete core wall and earthen dam across said Mayes Branch and inundated about 30 acres of land, and has continuously maintained said dam to this date, devoting the waters so impounded to the culture of fish and the irrigation of shrubbery trees and garden spot on adjacent land.

13. The Court further finds and adjudges that all of said permits for the appropriation of the waters of Grand River and Spavinaw Creek were prematurely issued because no hydrographic survey of the stream system of the Grand River or Spavinaw Creek had ever been made and filed as required by law, and no judicial determination by a court of competent jurisdiction of the appropriated and unappropriated waters of said Grand River or Spavinaw Creek had ever been had; that a hydrographic survey of the stream system of the Grand River was made by the Oklahoma Planning and Resources Board and filed in this cause on February 10, 1938, and that no adjudication by any court of competent jurisdiction of the appropriated and unappropriated waters of the stream system of Grand River has ever been made heretofore; that no vested right to appropriate any of the waters of Grand River to a beneficial use have accrued to any parties to the cause except the Grand River Dam Authority since statehood; that no person, firm or corporation ever appropriated or applied the waters of Grand River or Spavinaw Creek to beneficial use prior to statehood, other than the Town of Fort Gibson to the extent of 1.543 cubic feet per second, the City of Wagoner to the extent of 2 cubic feet per second, and the City of Muskogee to the extent of 5 cubic feet per second; that said three cities have an equal right to use the waters of Grand River for municipal purposes to the extent adjudged herein, which right is prior and superior to the rights of all other parties to that extent.

14. The Court further finds and adjudges that no person, firm or corporation other than the Grand River Dam Authority has acquired since statehood the right to appropriate any of the waters of Grand River to a beneficial use; that Article 4 of Chapter 70 of the 1935 Session Laws of the State of Oklahoma, which became effective on the 29th day of July, 1935, appropriated to and vested in the Grand River Dam Authority the absolute right to control, store and preserve the waters of Grand River for the purposes set forth in said Act, including the generation of electric energy, irrigation, recreation and the prevention of damage to persons and property from the flood waters of said river, and operated as an appropriation of all of the waters of Grand River to the Grand River Dam Authority for the purposes therein specified, subject only to the right of the Town of Fort Gibson to use for municipal purposes 1.543 cubic feet persecond of the flow of said river, the right of the City of Wagoner to use 2 cubic feet per second of the flow of said river for municipal purposes, and the right of the City of Muskogee to use 5 cubic feet per second of the flow of said river for municipal purposes, at the points of diversion hereinbefore adjudged; that the right of the Grand River Dam Authority to appropriate the waters of Grand River is prior and superior to the rights of the City of Vinita, the City of Pryor Creek, the City of Miami, T. C. Bowling, Cedar Crest Lakes Company, the Oklahoma Hydro-Electric Company, the Grand River Hydro-Electric Company, the Oklahoma Planning and Resources Board, and all other persons, firms, and corporations save and except the Town of Fort Gibson, the City of Wagoner and the City of Muskogee to the extent hereinbefore adjudged, and that the right of the Grand River Dam Authority to appropriate the waters of Grand River is prior and superior to the rights of the Town of Fort Gibson, the City of Wagoner and the City of Muskogee to appropriate the waters of said river in excess of 1.543 cubic feet per second for the Town of Fort Gibson, 2 cubic feet per second for the City of Wagoner, and 5 cubic feet per second for the City of Muskogee, and, the Court further finds and adjudges that the Act creating the Grand River Dam Authority is a legislative appropriation to the Grand River Dam Authority of all the waters of the Grand River and its tributaries in Oklahoma, except 1.543 cubic feet per second in favor of the Town of Fort Gibson, 2 cubic feet per second for the City of Wagoner and 5 cubic feet per second for the City of Muskogee, and that it is unnecessary for the Grand River Dam Authority to apply to the Oklahoma Planning and Resources Board

for a permit to appropriate the waters of Grand River to a beneficial use or secure from the Oklahoma Planning and Resources Board a permit or license to appropriate said waters to a beneficial use, or to construct works or facilities for use in applying said waters to a beneficial use; that no person, firm or corporation other than those hereinbefore mentioned, has ever applied for the right to appropriate or actually appropriated the waters of said River to a beneficial use.

15. The Court further finds and adjudges that the Grand River Dam Authority has declared its intention to construct and is now engaged in constructing a dam approximately 147 feet in height, across the Grand River near the Town of Pensacola, in Mayes County, Oklahoma; that said dam will impound at the power pool level 1,600,000 acre feet of water, and at the flood pool level 2,200,000 acre feet of water; that the Grand River Dam Authority has declared its intention and is proceeding to construct in connection with the said dam, a hydro-electric power plant with an installed capacity of 60,000 K.W., through which will pass during the operation of the plant, water varying from 1,000 to 6,000 cubic feet per second; said dam to be equipped with flood gates to control the flood waters of said river and with a sluice gate 10 feet square in the lower part of the dam structure, through which the waters of the river may be discharged at any time.

16. The court further finds and adjudges that at the Pensacola dam site the average flow of the Grand River is 6300 cubic feet per second, and that at the mouth of said river the average flow of the stream is 8400 cubic feet per second; that the run-off of the water shed of the Grand River below the Pensacola dam site is more than sufficient to supply the needs of the City of Pryor Creek, the City of Wagoner, the City of Muskogee and the Town of Fort Gibson, which take their water supply from the Grand River below the Pensacola dam site, and that the construction and operation of the Grand River dam and hydro-electric power plant by the Grand River Dam Authority will maintain in the channel of the Grand River below the Pensacola dam site, a very much larger flow during dry periods than now exists; that the control of the flood waters of Grand River through operation of the flood gates of said dam, will protect the waterworks facilities of said cities from inundation during flood periods; that the construction and operation of said dam by the Grand River Dam Authority will substantially aid in preventing the waters of the Arkansas River from entering the intake of the Muskogee waterworks system; that the construction and operation of said dam and hydro-electric power plant will materially benefit

the municipalities using the waters of Grand River for municipal purposes, by maintaining in said river a regular flow of water and providing them a better quality of water for their consumption; that the City of Vinita takes its supply of water for municipal purposes from the Grand River above the Pensacola Dam Site.

17. the Court further finds and adjudges that neither the Oklahoma Hydro-Electric Company, the Grand River Hydro-Electric Company, the Grand-Hydro, nor Clontz & Bozarth, have any rights to any of the waters of Grand River or its tributaries, and have never appropriated or applied any of the waters of said stream or its tributaries to a beneficial use.

18. The Court further finds and adjudges that subject to the prior right of the Town of Fort Gibson to divert and appropriate for municipal purposes 1.543 cubic feet per second of the flow of Grand River, and of the City of Wagoner to divert and appropriate for municipal purposes 2 cubic feet per second of the flow of Grand River, and of the City of Muskogee to divert and appropriate for municipal purposes 5 cubic feet per second of the flow of Grand River, and the prior right of the Grand River Dam Authority to appropriate all of the remaining flow of the Grand River for the purposes set forth in the Act creating the Grand River Dam Authority, the priorities of the parties hereto in the matter of making application to the proper authorities for a permit to appropriate the waters of Grand River to a beneficial use since statehood, are as follows and for the following purposes and to the following extent:

(1) The City of Pryor Creek to the extent of .375 cubic feet per second for its present municipal needs, and .75 cubic second feet for its future needs.

(2) The City of Muskogee to the extent of 30 cubic feet per second feet for municipal purposes;

(3) The City of Vinita to the extent of 5 cubic feet per second for municipal purposes;

(4) The City of Wagoner to the extent of 4 cubic feet per second for municipal purposes;

(5) T. C. Bowling, the waters of Mayes Branch, a tributary of Grand River, to the extent of 550 acre feet for fish culture and irrigation;

(6) Cedar Crest Lakes, 500 acre feet of the flow of Spring Creek, a tributary of Grand River in Mayes County, Oklahoma, for recreation and fish culture.

19. It is further ordered and adjudged by the Court that the total costs of this action are hereby taxed at $150.00, of which said sum the plaintiff of the City of Tulsa will pay $75.00, and the Grand River Dam

Authority $50.00, the City of Muskogee $15.00, and the Town of Fort Gibson and City of Wagoner each $5.00.

20. The defendants Oklahoma Hydro-Electric Company, City of Muskogee, City of Wagoner, City of Pryor Creek, City of Vinita, City of Miami, Town of Fort Gibson, Cedar Crest Lakes Company and T. C. Bowling, each excepts to the Court's findings and decree, which exceptions are hereby allowed by the Court.

RENDERED IN OPEN COURT this 14th day of February, 1938.

N. B. JOHNSON, JUDGE

(ENDORSED): No. 5263. In the District Court of Mayes County, Oklahoma. City of Tulsa, a municipal corporation, Plaintiff, vs. Grand-Hydro, a corporation, et al., Defendants. Decree. Filed in the District Court Mayes County, Oklahoma, February 10, 1938, R. A. DeLozier Court Clerk, by _____ Deputy. Recorded in Civil Journal No. 16, at page D. 82-83-84-85-86-87-88-89."

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INVESTMENT IN WATERWORKS PROPERTY

CITY OF TULSA, OKLAHOMA

WATERWORKS BONDS

WATERWORKS OF 1911	$ 90,000.00
WATERWORKS OF 1916	50,000.00
WATER FILTRATION OF 1916	180,000.00
WATER PUMP STATION of 1917	15,000.00
WATER PUMP & MAINS of 1917	660,000.00
WATERWORKS OF 1921	200,000.00
PRELIMINARY WATER SURVEY of 1921	25,000.00
WATERWORKS OF 1922	$6,800,000.00
WATERWORKS OF 1924	700,000.00
WATERWORKS OF 1925	500,000.00
RED FORK WATERWORKS OF 1917	20,000.00
RED FORK WATERWORKS OF 1921	19,000.00
RED FORK WATERWORKS OF 1925	50,000.00
CARBONDALE WATERWORKS OF 1926	35,000.00
WATERWORKS OF 1935	25,000.00
TOTAL WATERWORKS BONDS	$9,369,000.00

INVESTMENT IN WATERWORKS PROPERTY
CITY OF TULSA, OKLAHOMA

CAPITAL INVESTMENT FOR WATERWORKS IMPROVEMENT WITH FUNDS DERIVED FROM WATER DEPARTMENT REVENUE BY YEARS

1921	$ 106,109.00
1922	112,628.00
1923	197,965.00
1924	178,095.00
1926	330,586.00
1927	505,130.00
1928	489,378.00
1929	389,511.00
1930	299,534.00
1931	603,404.00
1932	303,074.00
1933	45,705.00
1934	17,157.63
1935	3,002.80
1936	10,365.65
1937	28,779.94
	43,847.98
TOTAL IMPROVEMENTS FROM REVENUE	$3,694,297.00

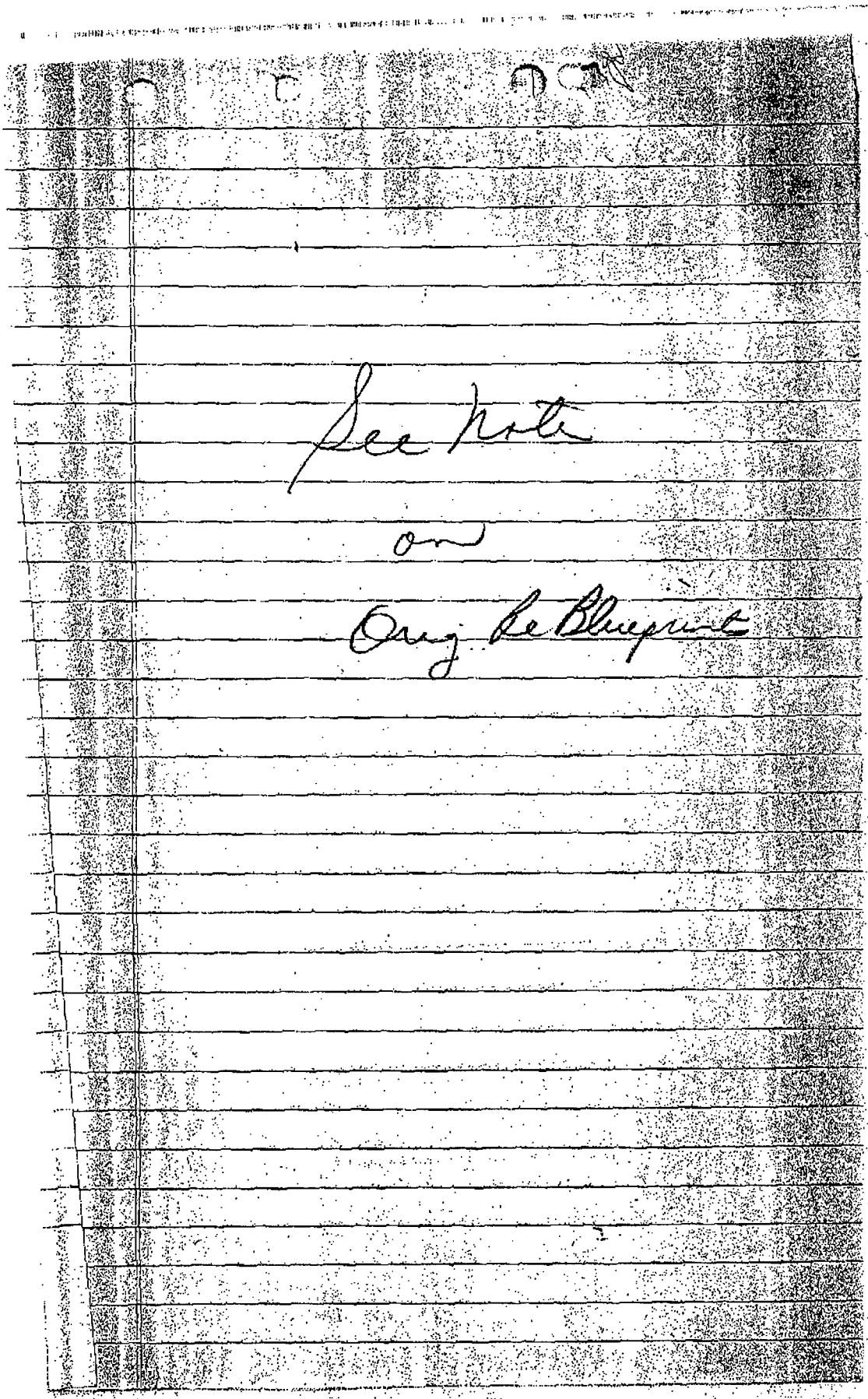
SUMMARY

Capital Improvements from Bonds	$9,369,000.00
Capital Improvements from Water Department Revenue	3,694,297.20
TOTAL	$13,063,297.20

WATER DELIVERED INTO SPAVINAW CONDUIT

OCTOBER 24, 1924 to JULY 1, 1938 by YRS.

YEAR	MILLION GALLONS
1924	1,775
1925	9,125
1926	9,125
1927	9,125
1928	9,125
1929	9,125
1930	9,125
1931	9,125
1932	9,125
1933	9,125
1934	9,125
1935	9,125
1936	9,125
1937	9,125
1938	4,563
TOTAL	124,963


See Note
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Orig. Le Blueprint

Certified Copy

STATE OF OKLAHOMA)
) SS
COUNTY OF MAYES)

CERTIFICATE OF TRUE COPY

I, R. A. DeLOZIER, the duly qualified, elected and acting Court Clerk in and for said County and State, do hereby certify that the annexed and foregoing instrument is a full, true and correct copy of the original Judgment rendered on the 14th day of February, 1938, in the action styled; City of Tulsa, plaintiff, vs. Grand-Hydro, et al., Defendants, No. 5263 in the District Court of said County, (and from said judgment no appeal was perfected) as the same appears of record and on file in my said office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed my official seal at Pryor, Oklahoma, this 1st day of November, 1938.

R. A. DeLOZIER
Court Clerk

By Lucille Utley
Deputy

(SEAL)

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

1. THE CITY OF TULSA, and 2. THE TULSA METROPOLITAN UTILITY AUTHORITY	PLAINTIFFS
v.	CASE NO.: 01 CV 0900EA(C)
1. TYSON FOODS, INC., 2. COBB-VANTRESS, INC., 3. PETERSON FARMS, INC., 4. SIMMONS FOODS, INC., 5. CARGILL, INC., 6. GEORGE'S, INC., and 7. CITY OF DECATUR, ARKANSAS	DEFENDANTS

POULTRY DEFENDANTS' REPLY TO PLAINTIFFS' RESPONSE TO POULTRY DEFENDANTS' MOTION FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE FOR PARTIAL SUMMARY JUDGMENT

Prepared and Submitted by:

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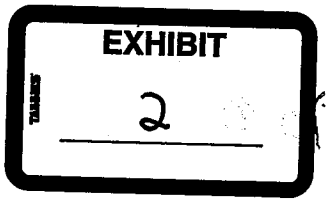

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INTRODUCTION

This case is before the Court on the Poultry Defendants' (Nos. 1 through 6 above) Motion for Summary Judgment or, in the Alternative, for Partial Summary Judgment (hereinafter referred to as the "Motion"). Plaintiffs have filed their Response to the Motion (hereinafter referred to as the "Response"). The Poultry Defendants offer the following in reply to the arguments raised by Plaintiffs in their Response.

PROPOSITION I

OKLAHOMA STATE LAW IS PREEMPTED BY THE PACKERS AND STOCKYARDS ACT AND AGRICULTURE FAIR PRACTICES ACT PURSUANT TO WHICH THE RELATIONSHIP BETWEEN THE POULTRY DEFENDANTS AND THE CONTRACT GROWERS HAS BEEN LEGISLATIVELY DEFINED AS THAT OF INDEPENDENT CONTRACTOR RATHER THAN AN EMPLOYER AND EMPLOYEE RELATIONSHIP.

In Section A(1) of the Motion, the Poultry Defendants discussed the Packers and Stockyards Act ("PSA") and the Agriculture Fair Practices Act ("AFPA") and set forth authority for the proposition that Oklahoma state law on the issue of the characterization of the relationship between the Poultry Defendants and the Contract Growers was preempted. As was clearly stated in the Motion, the Poultry Defendants' arguments regarding preemption were based upon the theory of implied preemption as that theory has been articulated and applied over many years, by many courts, including the United States Supreme Court. Although the Plaintiffs appear to agree with the statement of legal authority offered by the Poultry Defendants in their Motion, Plaintiffs argue against preemption in this case. None of the factual or legal arguments offered by Plaintiffs in their Response have any bearing upon the application of implied preemption in this case.

As pointed out in the Motion, implied preemption occurs where "the scope of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the

state to act." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001). As succinctly stated by Plaintiffs, implied preemption exists in situations where Congress has not preempted the entire field, but has preempted the field to the extent that state law actually conflicts with federal law. (*See* Plaintiffs' Response, pg. 7 (citing *Mich. Canners & Freezers Ass'n v. Agric. Mktg. & Bargaining Bd.*, 467 U.S. 461, 469 (1984)).

After citing the correct standards to be applied, Plaintiffs cease following the correct *implied* preemption analysis and merely attempt to confuse the issue by discussing various cases and other authorities dealing with *express* preemption, which has not been argued by the Poultry Defendants in this case. Even after alleging that they focus their Response on implied preemption, Plaintiffs devote a significant portion of the "analysis" in their Response to arguing that the field has not been expressly preempted. Though plaintiffs' review of that authority is intriguing, it is wholly irrelevant to the case at bar. The Poultry Defendants have never argued express preemption.

Furthermore, none of the implied preemption cases cited by Plaintiffs pertain in any way to the particular aspects of the PSA and AFPA which are relied upon by the Poultry Defendants in support of their implied preemption arguments. The issue before the Court pursuant to the Poultry Defendants' Motion is whether or not the enactment of the PSA and AFPA wherein Congress clearly defines Contract Growers as independent contractors rather than employees precludes this Court from seeking to apply state law principles to reach a contrary conclusion. In an attempt to cloud the otherwise simple issue before the Court, Plaintiffs reference this Court to cases holding that the PSA and AFPA do not preempt application of state law in the context of: (i) liability of a marketing agency for selling cattle for someone who does not own the cattle, (ii) ability of turkey growers to pursue state law negligence claims, and (iii) state inspection laws.

(*See* Plaintiffs' Response, pgs. 9-11). Obviously, none of those cases have any bearing upon the issue of whether or not the enactment of the PSA and AFPA by Congress precludes this Court from applying state law in such a way as to characterize the relationship between the Contract Growers and Integrators as something other than that specified in the PSA and AFPA. It appears that no court has yet to pass upon that precise issue, at least not in any reported decision. As such, this Court must look to the general principles of implied preemption in making its decision in this case.

As Plaintiffs acknowledge in their Response, Congressional intent is the pivotal inquiry in any implied preemption analysis. Despite this acknowledgment, Plaintiffs fail to cite to any actual authority that supports their assertion that implied preemption does not exist in this matter. The only evidence of actual Congressional intent was provided by the Poultry Defendants in the Motion and was completely undisputed by Plaintiffs in their Response. The only documented Congressional intent in the record shows that in revising the PSA and AFPA to include contract growers and to expressly state that contract growers are not employees of integrators, Congress intended to bring agriculture in line with modern business practices. (*See* Poultry Defendants Motion, pg. 17). As such, when looking to Congressional intent, it is clear that Congress added its provisions providing that Contract Growers are not employees and providing for contracts to be the basis for the relationship between the Contract Grower and the integrator *to support vertical integration farming, to support the independent contract grower, and to modernize agriculture.* If that were not the intent, Congress would not have needed to bring Contract Growers within the coverage of the PSA and AFPA in the first place.

Plaintiffs also acknowledge that preemption may be implied where *simultaneous compliance* with state and federal law is impossible or the state law *stands as an obstacle* to a

Congressional objective. *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Dev. Comm'n,* 461 U.S. 190, 204 (1985). Both of these situations would result if this Court decides that Contract Growers in the watershed are agents or employees of the Poultry Defendants. Because the PSA and AFPA provide that an independent contract grower who chooses to contract with an integrator is expressly defined as not being an employee or agent of the integrator, a decision to the contrary would not only be an obstacle to the PSA but would interfere with its purposes of protecting independent contract growers. The Plaintiffs' assertions to the contrary in their Response are clearly misplaced and should not be afforded any weight. As such, implied preemption clearly exists.

Plaintiffs seek to further confuse the issue in their Response by arguing that the Poultry Defendants' position is misplaced because the Poultry Defendants themselves have employees who run *company farms,* which is true. However, the PSA and AFPA were not designed to protect company farms (i.e., protect the integrator from itself), but instead were designed to protect and assist independent contract growers. The two situations are entirely unrelated and any reference to company owned farms is completely irrelevant.

PROPOSITION II

THE RELATIONSHIP BETWEEN THE POULTRY DEFENDANTS AND THE CONTRACT GROWERS IS THAT OF BAILOR/BAILEE AND AS SUCH THE POULTRY DEFENDANTS ARE NOT LIABLE FOR DAMAGES AND/OR CAUSES OF ACTION ARISING FROM ALLEGED ACTS OR OMISSIONS OF THE CONTRACT GROWERS.

Plaintiffs' arguments in response to the Poultry Defendants' argument regarding bailment is as unpersuasive as their response to the fact that implied preemption governs the relationship between contract growers and integrators. In this portion of their Response, Plaintiffs refer the Court to their Motion for Summary Judgment on Integrators' Liability for their Growers'

Disposal of Poultry Manure for the proposition that bailment does not apply to this situation. Accordingly, the Poultry Defendants hereby adopt and incorporate herein by reference their Joint Response to Plaintiffs' Motion for Summary Judgment on Integrators' Liability for their Growers' Disposal of Poultry Manure as that Response easily dispels Plaintiffs' proposition and illustrates that the arguments set forth in Plaintiffs' motion on that issue are without merit.

It is without question that the conduct upon which Plaintiffs' claims are premised occur entirely within the confines of a bailment relationship between the Poultry Defendants and the Contract Growers. The Poultry Defendants deliver poultry to Contract Growers for the particular purpose of raising the poultry under contract. Ownership of the birds remains with the Poultry Defendants at all times. These undisputed facts squarely meet all of the elements of the "bailment" definition provided in *Broaddus v. Commercial Nat. Bank of Muskogee*, 237 P.2d 583 (1925). Pursuant to the contract between them, the bailee/contract grower agrees that the bailor/integrator can direct certain aspects of its operation that directly impact the quality and suitability of the end product of the contractual agreement, i.e., the birds. Because of that bargained-for consideration, Plaintiffs contend that a bailor/bailee relationship does not exist. There is no indication in any of the cases or applicable statutes that the bailor and bailee cannot contractually agree that the bailor can make suggestions and impose certain quality assurance requirements regarding the finished product of the bailment.

Plaintiffs' arguments regarding the "control" allegedly exerted by the Poultry Defendants over various conditions relating to the raising of the birds, and the suggestion that such retained rights of "control" defeat the existence of a bailment are misplaced. Somehow, the Plaintiffs overlook the fact that it is the litter produced not the growing of poultry that they complain of. Plaintiffs have adduced absolutely no evidence suggesting that the Poultry Defendants have

exerted any degree of control over the Contract Growers' practices of land applying litter. In fact, the absence of any such control by the Poultry Defendants over those practices is the very heart of Plaintiffs' claims against the Poultry Defendants in this case.

Plaintiffs have offered absolutely no arguments or evidence sufficient to take the relationship of the Poultry Defendants and Contract Growers outside of the bailor/bailee relationship, at least not in the context of the Contract Growers' practices of land applying litter. The instant case is indistinguishable from the case of *Oklahoma Publishing Company v. Autry*, 463 P.2d 334 (Okla. 1969) discussed at length by both parties in their opening briefs where the court refused to impose liability upon a bailor for the acts of its bailee. The Poultry Defendants do not actually place litter where plaintiffs complain of. The Poultry Defendants do not select or recommend to the Contract Growers the location where litter is to be placed, nor do they exercise any control over where the litter is placed because contractually they do not have the right to do so. The Plaintiffs' assertions about "control" regarding the finished product are completely irrelevant to the issue of control over litter and do not defeat the persuasive and compelling authorities set forth in the Poultry Defendants' Motion on this issue. Therefore, to the degree that Plaintiffs' claims are based upon the acts or omissions of the Contract Growers, those claims fail as a matter of law and should be dismissed by the Court.

PROPOSITION III

THE PLAINTIFFS CANNOT RECOVER FROM THE POULTRY DEFENDANTS DUE TO THEIR INABILITY TO ESTABLISH A CAUSAL LINK BETWEEN THE DAMAGES OR INJURIES ALLEGED AND THE ACTS OR OMISSIONS OF ANY PARTICULAR POULTRY DEFENDANT OR ANY PARTY(IES) FOR WHOSE CONDUCT ANY PARTICULAR POULTRY DEFENDANT COULD BE HELD LIABLE.

Plaintiffs cannot submit any proof on the issue of causation, so instead they intertwine the issues of causation and the applicability of joint and several liability. Plaintiffs mistakenly argue that because they are asserting *intentional* torts they do not have to prove causation by each defendant because the Poultry Defendants are jointly and severally liable. (*See*, Plaintiffs' Combined Response to Motions for Summary Judgment by Tyson Foods, Inc., Cobb-Vantress, Inc., and Simmons Foods, Inc. on the Issue of Causation, pgs. 2-5). However, proof of causation is a required element of every cause of action, regardless of the nature of the claim, whether founded on negligence, reckless conduct, intentional conduct, or even breach of contract or warranty. Accordingly, whether Plaintiffs allege that the Poultry Defendants acted negligently or intentionally has no bearing on the issue of *causation*. In other words, even assuming *arguendo* that Plaintiffs' unfounded accusations that the Poultry Defendants intentionally dumped tons of poultry litter in the Watershed were true, it is immaterial to this lawsuit unless Plaintiffs can present legally sufficient evidence that the litter from Contract Growers for each defendant found its way to Lake Eucha or Spavinaw and caused damage. While it is true that in certain situations joint and several liability is imposed on defendants if they acted intentionally, the issue of whether liability is several or joint and several is the second step in the analysis - first and foremost, Plaintiffs must prove that their damages were caused by the Poultry Defendants. Plaintiffs simply cannot meet that burden. Plaintiffs cite *Union Texas Petroleum Corp. v. Jackson*, 909 P.2d 131 (10th Cir. 1995) in support of their creative argument that to merely *allege intentional conduct* is sufficient to prove causation by the Poultry Defendants. However, Plaintiffs mis-characterize the facts and law of that case. *Union Texas* involved an appeal from the Oklahoma Corporation Commission's rulings regarding liability of oil companies for saltwater contamination to the subsurface waters of the town of Cyril. *Id.* at 135. All oil

companies who had operated in the area were parties to the action. *Id.* Contrary to what Plaintiffs would lead the Court to believe, the ALJ specifically ruled that no "liability or responsibility would be imposed" without proof of "*causation* and injury." *Id* at 136 (*emphasis added*). There is no mention anywhere in the opinion of the far-fetched concept that a plaintiff is relieved of the burden of proving causation if he alleges the defendant acted intentionally. In fact, whether the respondent oil companies acted intentionally or negligently was not even an issue in the case. To enable him to decide the issues of causation and damages, the ALJ conducted a 21-day evidentiary hearing. As a result, the ALJ found that certain subsurface waters were contaminated with saltwater. *Id.* at 135. Significantly, the ALJ further found that "oil and gas production operations are the *only* source of saltwater in the area." *Id.* (*emphasis added.*) And, unlike the present case, *all* of the potential contributors of the pollutant (saltwater) were parties to the action.

The facts of the instant case are easily distinguished from the facts of *Union Texas*. Poultry litter is only one of many sources of phosphates in the Watershed, yet Plaintiffs attempt to place all the blame for their alleged injuries on poultry litter. Furthermore, in *Union Texas* the oil production activities occurred in the immediate vicinity of Cyril. In this case, Plaintiffs assert that all phosphates from poultry litter land-applied in the relevant portion of Arkansas has made its way to Lake Eucha or Spavinaw and caused injury. However, as stated more fully in the Poultry Defendants' Motion, Plaintiffs' primary expert Dr. Storm did not take into account topography or any other natural phenomena which affect whether phosphates in Arkansas soil would ever get as far as Lake Eucha - he merely assumed that it did.

Another tactic Plaintiffs employed in attempting to conceal their inability to meet their burden of proof of causation is to refer to injury to the "Watershed." For example, Plaintiffs

state that they do not have to prove causation with respect to each Defendant "because injury to the Watershed is indivisible." (*See*, Plaintiffs' Combined Response to Motions for Summary Judgment by Tyson Foods, Inc., Cobb-Vantress, Inc., and Simmons Foods, Inc. on the Issue of Causation, pg. 2.) Moreover, the Plaintiffs cite an excerpt of Dr. Shannon's deposition in which he states that some phosphates in the Watershed are attributable to land-applied poultry litter. (*See*, Plaintiffs' Combined Response to Motions for Summary Judgment by Tyson Foods, Inc., Cobb-Vantress, Inc., and Simmons Foods, Inc. on the Issue of Causation, pg. 8.) However, Plaintiffs do not own the "Watershed" - instead, they own, at the very most, a license to use a limited quantity of the waters contained in Lakes Eucha and Spavinaw.[1] The "Watershed" consists of thousands of acres of real property in Arkansas and Oklahoma which is owned by various and sundry persons, the vast majority of whom are not parties to this lawsuit. Accordingly, the only legal claim that Plaintiffs have is for damage, if any, to the waters in Lakes Eucha and Spavinaw, assuming that Plaintiffs' license is sufficient to support a cause of action for trespass or nuisance.[2] As such, Plaintiffs have the burden of proving that the waters in Lakes Eucha and Spavinaw have been damaged by the conduct of each of the Poultry Defendants. Plaintiffs simply cannot meet their burden of proof on this issue. Plaintiffs principally rely on the modeling work done by Dr. Storm in support of their claims. As stated in the Poultry Defendants' Motion, Dr. Storm cannot opine as to the amount of phosphates in the lakes, if any,

[1] See Defendant City of Decatur's Motion for Summary Judgment and Brief in Support, p. 4, and Exhibit 1 thereto.

[2] Whether the license to utilize a limited amount of the waters of Lakes Eucha and Spavinaw is legally sufficient ownership of property to support a trespass or nuisance claim is addressed in Defendant Cargill's Separate Motion for Summary Judgment, as well as Decatur's Motion for Summary Judgment, both of which are hereby adopted by the Poultry Defendants and incorporated herein by reference.

are attributable to any of the Defendants - he did not even attempt to calculate it.[3] In fact, neither Dr. Storm nor any other expert in this case has opined that the conduct of any particular defendant (much less the conduct of each and every defendant) has resulted in the contribution of phosphates to Lakes Eucha and Spavinaw. At best, Plaintiffs have offered proof that each defendant has Contract Growers in the Watershed which produce litter that may or may not have been land applied in the Watershed. Plaintiffs have offered nothing in the way of actual proof of causation with respect to any (let alone each) Poultry Defendant. When confronted with this shortcoming, Plaintiffs state that Dr. Storm is not the only expert they rely on to support their claims. (*See*, Plaintiffs' Combined Response to Motions for Summary Judgment by Tyson Foods, Inc., Cobb-Vantress, Inc., and Simmons Foods, Inc. on the Issue of Causation, pgs. 8-9.) However, none of the other experts Plaintiffs have named can offer any evidence as to the causal link between the phosphates in the Lakes and the conduct of any of the Poultry Defendants. Plaintiffs simply cannot meet their burden of proof on the issue of causation and Defendants are entitled to summary judgment on all of Plaintiffs' claims.

PROPOSITION IV

THE POULTRY DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT IN THEIR FAVOR DISMISSING PLAINTIFFS' CERCLA CLAIM AS A MATTER OF LAW.

Plaintiffs devote over sixteen (16) pages of their Response in trying to revive a claim for relief under CERCLA which clearly cannot survive summary judgment. The inescapable reality which Plaintiffs have asked this Court to ignore is that CERCLA does not apply in this case because there has been no release of a hazardous substance and the land application of poultry litter falls squarely within the fertilizer exception contained in CERCLA. Moreover, if

[3] See Poultry Defendants' Motion, pg. 24, and Exhibit N.

CERCLA applies, Plaintiffs' claim still must fail given their failure to comply with the NCP.

A. Plaintiffs cannot identify a release of a hazardous substance as is essential to any *prima facie* claim for relief under CERCLA.

All parties agree that the only substances contained in poultry litter which could even arguably trigger the application of CERCLA are phosphates (specifically orthophosphate, PO_4). (*See,* Plaintiffs' Response, pg. 17.) It is also undisputed that the molecular composition of orthophosphate (like all other phosphates and countless products used and discarded every day, including over 12,000 food products) includes phosphorus. Plaintiffs ask this Court to render an unprecedented ruling that when the EPA listed *elemental phosphorus* as a hazardous substance under CERCLA, it intended to declare "all phosphorus containing compounds" as hazardous substances as well. There simply is no support (legally or logically) for Plaintiffs' position.

This issue has been extensively briefed by the Poultry Defendants at section V(A)(1) of their Motion and at section III(A) of the Poultry Defendants' Response to Plaintiffs' Motion for Summary Judgment on CERCLA Liability. In the interests of brevity and judicial economy, the Poultry Defendants incorporate those arguments and authorities herein by reference. The Poultry Defendants have clearly demonstrated that phosphates contained in poultry litter are not a "hazardous substance" under CERCLA and therefore the Poultry Defendants are entitled to summary judgment with respect to Plaintiffs' CERCLA claim.

The only "new" issue raised by Plaintiffs in their Response which has not already been addressed and squarely refuted by the Poultry Defendants in their previous filings in this case pertains to Plaintiffs' citation of several cases wherein they contend courts have held that phosphates are "toxic". (*See,* Plaintiffs' Response, pg. 17, fns. 9-10 (citing *Gonzalez v. Virginia-Carolina Chem. Co.*, 239 F.Supp. 567, 571 (E.D. S.C. 1965) and *Soap & Detergent Assoc. v. Clark*, 330 F. Supp. 1218, 1220 (S.D. Fla. 1971)). Neither of Plaintiffs' "new" cases have any

applicability to the matters before this Court. *Gonzalez* is a products liability case in which a crop dusting pilot sued a manufacturer of defoliant used in crop dusting because the manufacturer failed to obey labeling requirements of South Carolina law or the Federal Insecticide, Fungicide and Rodenticide Act. The matter was brought fifteen years prior to the enactment of CERCLA and as such there is no discussion regarding phosphates being a defined hazardous substance under CERCLA. In short, *Gonzalez* has absolutely no applicability with respect to Plaintiffs' CERLCA claim. *Soap & Detergent Assoc.* is a case regarding the constitutionality of a county ordinance prohibiting the sale or use of detergents containing phosphorus in highly populated Dade County, Florida. Nowhere in the decision does the court label or even discuss whether or not phosphorus is "toxic." In any event *Soap & Detergent Assoc.* was brought prior to enactment of CERCLA and does not provide any support to or insight with respect to Plaintiffs' creative argument that phosphate, as it is found Poultry Litter, is a defined hazardous substance under CERCLA.

B. Plaintiffs Response Actions are "Removal" not "Remedial" as a matter of law, and therefore only "substantial compliance" with the NCP is required.

In an apparent attempt to avoid the indisputable evidence of a complete lack of compliance by Plaintiffs' with the NCP as is required to recover under CERCLA, Plaintiffs have declared (and on the basis of that declaration alone ask this Court to accept) that their response actions for which they are seeking response costs were "removal" rather than "remedial." Plaintiffs' motives are quite transparent. Upon examination of the case law and legal authority expounding upon NCP compliance as a pre-requisite for recovery under CERCLA, Plaintiffs have discovered that while the law is fairly unforgiving on the issue of NCP compliance in the context of remedial actions, the standard of compliance is relaxed somewhat for removal actions.

Sherwin Williams Co. v. City of Hamtramck, 840 F. Supp. 470, 475 (E.D. Mich. 1993). The Poultry Defendants do not dispute Plaintiffs' statement that "only substantial compliance with the NCP is required in removal actions." Plaintiffs do, however, dispute Plaintiffs' unsupported suggestion that the actions undertaken by Plaintiffs for which they are seeking to recover response costs in this case are more appropriately characterized as "removal" rather than remedial in nature.

CERCLA defines removal actions as "the cleanup or removal of released hazardous substances from the environment, such actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release . . . ." 42 U.S.C. 9601(23). "Removal actions are short term responses to imminent threats to the public safety or the environment. They are to be taken 'in response to an immediate threat to the public welfare or to the environment.'" *Sherwin Williams Co. v. City of Hamtramck*, 840 F. Supp. 470, 475 (E.D. Mich. 1993). *citing Amland Properties Corp. v. Alcoa*, 711 F. Supp. 784, 795 (D.N.J. 1989); *see also Channel Master Satellite Sys., Inc. v. JFD Electronics. Corp.*, 748 F. Supp. 373, 384-86 (E.D.N.C. 1990). "CERCLA distinguishes the two types because 'removal actions were designed to provide an opportunity for immediate action ... without detailed review due to the exigencies of the situation.'" *Sherwin Williams*, 840 F. Supp. at 475 *citing Channel Master*, 748 F. Supp. at 385-56.

Remedial actions are defined as "those actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release . . . to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment. The term

includes . . . neutralization, cleanup of released hazardous substances and associated contaminated materials." 42 U.S.C. 9601(24).

Plaintiffs' response actions taken with respect to the Water Supply if anything could only be remedial in nature. Plaintiffs' assertion that their response actions are "removal" is simply absurd. As stated above, CERCLA distinguishes the two types because 'removal actions were designed to provide an opportunity for immediate action . . . without detailed review due to the exigencies of the situation.'" *Sherwin Williams*, 840 F. Supp. 470, 475 *citing Channel Master*, 748 F. Supp. at 385-56. Plaintiffs have participated in seven extensive studies and analysis over the last six years all of which they claim to be response costs in this action. (*See* Exhibit 35 to Plaintiffs' Motion for Summary Judgment) This could hardly be described as "immediate action," furthermore the Plaintiffs' costs associated with studies and review performed in the last six years are in excess of $795,000.00, a clear indication of detailed review.

In *Sherwin Williams,* the City of Hamtramck argued that its response action amounted to removal activity. The court found the city's response had taken at least five years and the city demonstrated no imminent threat to health or safety and the extended and protracted nature of the response indicted that the city engaged in a remedial action. *Id. at 475-76.* Plaintiffs in this case, just as the City of Hamtramck, have engaged in an extended and protracted response in which there is no imminent threat to health or safety. As such, their action is remedial in nature.

Notwithstanding Plaintiffs' attempt at revisionist history, there can be no legitimate dispute that the actions at issue in this case are more appropriately characterized as "remedial" rather than "removal" in nature. As such, substantial compliance with the NCP is required. Plaintiffs have not and cannot demonstrate substantial compliance and, therefore, their CERCLA claim must fail as a matter of law. Furthermore, as was demonstrated in Section V(A)(2) of the

Motion and as is discussed further herein below, the Plaintiffs can not demonstrate *any level of compliance* with the NCP, substantial or otherwise. Therefore, summary judgment in favor of the Poultry Defendants is appropriate regardless of whether the Plaintiffs' actions were "removal actions" or "remedial actions."

C. Plaintiffs cannot demonstrate compliance (substantial or otherwise) with the NCP, and such a finding as matter of law is appropriate prior to trial.

No where is Plaintiffs' lack of faith in their arguments regarding NCP compliance more evident than in their request that this Court arbitrarily divide its decision-making process with respect to the merits of their CERCLA claim into two separate stages or phases. While Plaintiffs acknowledge that this Court can and should rule at the summary judgment stage on the issues of whether phosphates are hazardous substances under CERCLA and the applicability of the fertilizer exception, they ask this Court to delay until trial any rulings on NCP compliance and damages. Every court to have considered the issue has held that NCP compliance is an essential element of a *prima facie* claim for relief under CERCLA. *See, e.g. Public Service Co. of Colorado v. Gates Rubber Co.*, 175 F.3d 1177, 1182 (10th Cir. 1999); *Morrison Ent. V. M. Shares, Inc.*, 302 F.3d. 1127 (10th Cir. 2002.) As such, Plaintiffs have the burden of proving such compliance and in the absence of such proof they cannot recover damages under CERCLA.

Notwithstanding the foregoing statement of the law, which Plaintiffs have not disputed, Plaintiffs have requested that this Court "delay" its ruling on the issue of NCP compliance (or in this case "non-compliance") raised by Poultry Defendants in their Motion. In support of their request for a "delayed ruling" on the issue of NCP compliance, Plaintiffs argue that it is appropriate for this Court to "bifurcate" the proceedings on their CERCLA claim. This Court is not required to bifurcate Plaintiffs claims into separate trials. In *Acushnet Company v. Mohasco*

Corp. 191 F.3d 69, 81 (1st Cir. 1999) the court held that "district courts have considerable latitude to deal with issues of liability and apportionment in the order they see fit to bring the proceedings to a just and speedy conclusion. CERCLA does not demand a bifurcated trial on this score ..." This Court has the authority to decide Plaintiffs CERCLA claim in its entirety (i.e. liability, NCP compliance, necessary costs of response and apportionment) on summary judgment, in a single trial or a bifurcated trial in order to bring this matter to a just and speedy conclusion.

Finally, Plaintiffs argue that a determination of compliance with the NCP is "too fact intensive" to be made pursuant to summary judgment. Of course, Plaintiffs offer absolutely no evidence to support that characterization nor do they even attempt to identify the "facts" which will require so much of the Court's time in considering their claim of compliance with the NCP. Furthermore, the notion that establishing compliance with the NCP involves a fact-intensive inquiry by this Court is absurd. As explained by the Poultry Defendants in their Motion, the NCP has very specific and detailed provisions applicable to response actions under CERCLA. Although it appears that Plaintiffs were not aware of those provisions at the time in which they were involved in their "response actions," they are obviously aware of them now. If the Plaintiffs have complied with those provisions, such compliance could easily be demonstrated by simply providing documentary proof or evidence in the form of a affidavits setting forth the specific actions or conduct which they undertook in compliance with the NCP. Plaintiffs are merely seeking to delay the inevitable – a finding of noncompliance with the NCP.

1. Public Comment

Plaintiffs eleventh hour attempt to show public comment is woefully inadequate. Plaintiffs seem to be arguing that because they are "public bodies" their activities performed in

"open meetings" would be sufficient to satisfy the public comment requirement under the NCP. In support, Plaintiffs attach less than five notices and agenda's of TMUA meetings. (See Exhibits G and H to Plaintiffs' Response). Interestingly, those documents were produced to the Poultry Defendants less than three weeks ago, subsequent to the Poultry Defendants filing its motion for summary judgment.[4] Regardless of the lateness of the production, Plaintiffs' actions in its response do not reflect substantial compliance with the public comment requirement of the NCP. Plaintiffs have not produced a single document which reflects Plaintiffs seeking the public's comment or the public commenting on Plaintiffs' activities. Moreover, Plaintiffs have not produced a single document which shows that Plaintiffs published a brief analysis of the proposed plan in a major newspaper; that Plaintiffs allowed not less than thirty days for the submission of written or oral comments from the public; or that Plaintiffs conducted a public meeting during the comment period at or near the proposed cleanup site. *Sherwin Williams Co. v. City of Hamtramck*, 840 F. Supp. 470, 477 (E.D. Mich. 1993) *citing* 40 C.F.R. § 300.430(f)(3)(A)-(E). "Courts have consistently held that failure by a party to provide for the required opportunity for public comment 'renders a remedial action inconsistent with the NCP and bars recovery of costs'" *Id.* at 476 (internal citations omitted). Clearly, Plaintiffs have failed to show any compliance with the public comment requirement of the NCP and as such their CERCLA claim must fail.

2. Remedial Site Evaluation, Feasibility Study, and Selection of Remedy

Plaintiffs' attempt to show compliance with the NCP's requirements with respect to site evaluation, feasibility study and remedy selection is also inadequate. Plaintiffs attach excerpts of

[4] Even more troubling is the fact that those documents were neither identified nor disclosed by Plaintiffs in response to discovery requests specifically asking for documents that Plaintiffs contend are evidence or support their claimed compliance with the NCP.

reports which they partially funded and participated in at exhibits K, L, M to their Response. None of these reports substantially comply with requirements of the NCP with respect to site evaluation, feasibility study and remedy selection. The Poultry Defendants have extensively briefed and identified the flaws of Plaintiffs' reports in Sections V(A)(2)(a)(b) and (c) of the Motion and hereby incorporate those sections by reference as if fully set forth herein.

3. Appropriateness of Expert Testimony to Show NCP Compliance.

Plaintiffs argue that expert testimony is appropriate to show compliance with the NCP, but admit that "the characterization of a response action is a matter for the court and should not be abdicated to an expert." (Plaintiffs' Response, p. 28.) Plaintiffs are unable to cite a single case which expressly states that expert opinions with respect to NCP compliance is permitted. Additionally, subsequent to his deposition, Plaintiffs have procured an affidavit from their expert, Ben Costello identifying litigation experience which Mr. Costello claims qualifies him as an expert on NCP compliance. These cases were not included in Mr. Costello's curriculum vitae previously provided to the Poultry Defendants and the Court. Mr. Costello's subsequent additions are prejudicial to the Poultry Defendants in that they were not given the opportunity to depose him with respect to all of his alleged experience. Moreover, the Poultry Defendants have extensively discussed this issue in the Poultry Defendants' Motion in Limine to exclude the testimony of Ben Costello and hereby incorporate same by reference as if fully set forth herein.

D. The Contract Growers' Land Application of Poultry Manure Does Qualify for the "normal" application of fertilizer exception.

The Poultry Defendants have extensively discussed the applicability of the "fertilizer exception" of CERCLA with respect to the application of poultry litter in the Watershed in the Poultry Defendants' Response to Plaintiffs' Motion for Summary Judgment and hereby incorporate same by reference as if fully set forth herein.

PROPOSITION V

TO THE EXTENT THAT PLAINTIFFS CAN ASSERT A CLAIM FOR RELIEF UNDER CERCLA (WHICH THE POULTRY DEFENDANTS ASSERT THEY CANNOT), SUCH A CLAIM MUST BE LIMITED TO A CLAIM FOR CONTRIBUTION. PLAINTIFFS CANNOT MAINTAIN A COST RECOVERY CLAIM UNDER CERCLA BECAUSE EACH IS A "POTENTIALLY RESPONSIBLE PARTY."

In the Motion, the Poultry Defendants advanced the argument that to the extent that Plaintiffs could proceed with a claim for relief under CERCLA, that claim must be in the form of a contribution claim pursuant to Section 113(f) rather than a cost recovery claim/indemnity claim pursuant to Section 107(a). As the Poultry Defendants pointed out in their Motion, a Section 107(a) cost recovery claim under CERCLA is available only where the plaintiff is not also a contributor to the pollution or contamination which necessitated the response actions. When the plaintiff is also a potentially responsible party with respect to the contamination or pollution at issue, the plaintiffs' only recourse under CERCLA is a contribution claim pursuant to Section 113(f). *See* 42 U.S.C. §§ 9607(a) and 9613(f); *see also Morrison Ent. v. McShares, Inc.*, 302 F.3d 1127 (10th Cir. 2002) (District court did not err in dismissing a Section 107(a) claim on summary judgment where plaintiff is a potentially responsible party and plaintiff may only proceed with an action for contribution under Section 113(f)). "Potentially responsible parties (PRP) who have contributed waste to the site are jointly and severally liable for cleanup costs, and are limited to seeking contribution from other PRPs." *Sun Co., Inc. v. Browning-Ferris, Inc.*, 124 F.3d 1187, 1191 (10th Cir. 1997).

Plaintiffs have not disagreed with the foregoing statement of the law, nor have they denied the fact that they have discharged phosphates directly into Lake Eucha and that they have mixed "contaminated water" from Lake Oolagah with water from Lakes Eucha and Spavinaw

prior to supplying that water to Tulsa residents. Nevertheless, Plaintiffs seem to argue that notwithstanding their admitted contribution of alleged pollutants to the very water supply for which they are now seeking damages there should be no reduction of damages based upon their contribution because their contribution was "*micro de minimis*". Plaintiffs arguments in this regard are misplaced. First, Plaintiffs offer absolutely no authority for the proposition that their status as a "potentially responsible party" is dependent upon the Poultry Defendants establishing some "significant" or "substantial" level of contribution by Plaintiffs. In fact, such an argument is directly contradictory to the authority cited by Plaintiffs in their Motion for Partial Summary Judgment on the Issues of CERCLA Liability wherein they have vigorously advanced the argument that liability under CERCLA is not dependent upon the "amount" of hazardous substances released. (*See,* Plaintiffs' Mot. Partial Summ. J. CERCLA Liability, pg. 18, (citing *B.F. Goodrich Co. v. Murtha*, 958 F.2d 1192 (2d. Cir. 1992)). Furthermore, even if the quantity of pollutants released by Plaintiffs was relevant, which it is not, the undisputed evidence in this case indicates that contrary to Plaintiffs' suggestion they have released a substantial amount of phosphates into the water supply.

Plaintiffs' attempts to characterize their phosphate contributions in the Watershed as "micro de minimis," "minisule," and "infinitesimally small" are misleading. Plaintiffs are attempting to trivialize their contribution of phosphates to the Watershed by only discussing activities with respect to their discharges of wastewater from their sewage lagoons at Eucha State Park directly in Lake Eucha. Plaintiffs fail to mention the land application of nearly 5,000,000 gallons of liquid sewage to the Watershed between 1992 and 1997. (*See,* Poultry Defendants' Response to Plaintiffs' Motion and Brief in Limine to Exclude Irrelevant and/or Prejudicial Evidence.) Mr. Costello's expert report does not even attempt to quantify that contribution.

Notwithstanding Mr. Costello's questionable and inadmissible opinion that Plaintiffs' sewage discharges have no "causal connection to algae blooms and resulting problems," it is irrefutable that Plaintiffs have contributed the same constituent which they allege the Poultry Defendants have contributed.[5] That fact alone under CERCLA makes Plaintiffs partially responsible parties and as such they can only pursue a claim of contribution. There is no dispute among the courts. A partially responsible party (PRP) may only proceed with an action for contribution under 42 U.S.C. 9613(f). *Morrison v. McShares, Inc.* 302 F.3d 1127, 1135 (10th Cir. 2002).

A fair reading of Plaintiffs' Response indicates that although they are not willing to admit to the validity of the Poultry Defendants' arguments regarding their inability to pursue a Section 107(a) cost recovery claim, they do not seriously dispute the Poultry Defendants' arguments in that regard. Plaintiffs' implied concession on this point is illustrated by their rather curious attempt to turn their Response into a late-filed motion in limine by asking the Court to exclude from the jury any evidence of Plaintiffs' contribution of pollutants. This unfounded request for exclusion has been addressed by Plaintiffs in their Motion in Limine filed herein. The Poultry Defendants have responded to that motion and their response is incorporated herein by reference.

PROPOSITION VI

ALL CLAIMS ASSERTED ON BEHALF OF TMUA SHOULD BE DISMISSED BECAUSE THE TMUA HAS NOT SUSTAINED AN INJURY IN FACT AND THEREFORE IS NOT A REAL PARTY IN INTEREST.

The heart of Plaintiffs' claims is that phosphates from land-applied poultry litter has migrated to Lakes Eucha and Spavinaw and caused injury. Accordingly, to maintain a cause of

[5] The inadmissibility of Mr. Costello's proferred opinions on this and a myriad of other topics is addressed in the Poultry Defendants' Motion in Limine to Exclude Testimony and Opinions of Benjamin Costello.

action, TMUA must have an ownership interest in Lakes Eucha and Spavinaw.[6] Plaintiffs argue that TMUA has standing because Tulsa leased its waterworks facilities to TMUA. However, Tulsa's lease of its waterworks facilities is insufficient to support standing of TMUA for several reasons. First, the lease does not pertain to Lake Eucha or Lake Spavinaw; the Lease clearly states that all land and equipment covered by the lease is located in Tulsa County, Oklahoma. Neither Lake Eucha or Lake Spavinaw is located in Tulsa County, Oklahoma, a fact of which the Poultry Defendants ask the Court to take judicial notice. Accordingly, the existence of the lease is immaterial, irrelevant, and insufficient for standing in this case.

Secondly, even if the lease could somehow be construed to include Tulsa's limited license in waters of Lakes Eucha and Spavinaw, Tulsa cannot lease a greater interest in the lakes than it has. Tulsa does not own Lake Eucha or Lake Spavinaw, the State of Oklahoma does.[7] The only interest Tulsa has is a limited license to use a predetermined amount of water from the lakes. Because such interest is insufficient to support claims of Tulsa, it is also insufficient to support claims by TMUA.

Thirdly, although Plaintiffs attempt to convince the Court that TMUA has sustained damages, the truth is that TMUA is nothing more than a department of Tulsa that happens to have a fancy title. Tulsa's former mayor and others testified that TMUA has no employees and that it receives its funding from Tulsa. Plaintiffs state that TMUA has an "operating fund" and that proves that they are independent of Tulsa. However, the exhibit referred to by Plaintiffs clearly states that *Tulsa* funded the operating fund. (*See*, Plaintiffs' Response to Poultry

[6] The arguments and authorities contained in Defendant City of Decatur's Motion for Summary Judgment and Brief in Support are incorporated herein.

[7] See Defendant City of Decatur's Motion for Summary Judgment and Brief in Support, p. 4, and Exhibit 1 thereto.

Defendants' Motion for Partial Summary Judgment, pg. 35, and Exhibit N thereto, document marked "TMUA002667.")

PROPOSITION VII

THE PLAINTIFFS CANNOT RECOVER DAMAGES FOR ANNOYANCE AND INCONVENIENCE PURSUANT TO THEIR NUISANCE CLAIM SINCE PLAINTIFFS ARE INCAPABLE OF SUFFERING EMOTIONAL INJURY.

From Plaintiffs' Reply (Proposition VII) it appears, at least in part, that Plaintiffs are trying to re-cast the Poultry Defendants' argument as asserting that Plaintiffs, as non-living beings, cannot assert a nuisance claim. This is not the issue raised by the Poultry Defendants' proposition here, rather, the issue is which type of damages are recoverable to these municipal entities, given that they are incapable, in both the legal and practical sense, of suffering personal injury. Plaintiffs acknowledge that entities of their type cannot suffer emotional injuries; therefore, since there are no facts in dispute, this issue is ripe for summary adjudication.

Contrary to Plaintiffs' contention, the Poultry Defendants are not dealing in semantics, and there is an abundance of authority to support the Poultry Defendants' proposition. The Oklahoma law of nuisance is clear. There are two types of injury that may be redressed if a nuisance is proven, that for injury to the property, and for injury to the person. The Oklahoma Supreme Court undertook an analysis of several of its prior decisions on this issue in *Truelock v. City of Del City*, 967 P.2d 1183 (Okla. 1998), and concluded:

> [These cases] make inescapable the conclusion that the cause of action for inconvenience, annoyance, and discomfort is one for personal injury and is separate and distinct than the cause of action for damages to property, although the right to both may arise in a suit for nuisance.

Id. at 1187; *see also* Plaintiffs' cited case of *Oklahoma City v. Eylar*, 61 P.2d 649, 650-51 (Okla. 1936) (drawing same conclusion and describing annoyance and inconvenience damages as being

for "physical discomfort"). Plaintiffs' attempt to cite antiquated authority from Arkansas to support their argument does not change the analysis; because, unlike their cited case, *Gus Blass Dry Goods Co. v. Reinman & Wolfort*, 143 S.W. 1087 (Ark. 1912), the Poultry Defendants are not challenging by way of this argument, Plaintiffs' right to seek the equitable remedy of abatement. What is clear here is that Plaintiffs' attempt to recover damages for personal injuries by way of their annoyance and inconvenience claims is not allowed, and should be stricken by the Court.

PROPOSITION VIII

PLAINTIFFS CANNOT SHOW EITHER AN EXPENDITURE ADDING TO THE PROPERTY OF ANOTHER OR AN EXPENDITURE WHICH SAVES THE POULTRY DEFENDANTS FROM EXPENSE OR LOSS AND AS SUCH CANNOT RECOVER ON A THEORY OF UNJUST ENRICHMENT.

Plaintiffs allege that they have "saved" the Poultry Defendants costs resulting from water treatment performed by Plaintiffs and as such the Poultry Defendants have been unjustly enriched. (*See*, Plaintiffs' Response, pg. 41.) The very core of a claim for unjust enrichment is a showing by the plaintiff that it has made an expenditure. That expenditure must add to property of another, or that expenditure must save the other from expense or loss. *County Line Inv. Co. v. Tinney*, 933 F.2d 1508, 1518 (10th Cir. 1991). Contrary to Plaintiffs' assertion, the test is not simply has the Plaintiff conferred a benefit on the Defendant (which they have not,) the Plaintiffs must show an expenditure on their part which has saved the Defendants from expense or loss. Plaintiffs have not shown any expenditure made by them which has saved the Poultry Defendants from any expense which they were obligated to incur or any loss which they are obligated to sustain. Plaintiffs' argument is based on the illogical assumption that it is the Poultry Defendants' responsibility to treat the water which is supplied to Plaintiffs' customers. The treatment of Plaintiffs' Water Supply is Plaintiffs' responsibility, not the Poultry

Defendants, and any expenditure made with respect to Plaintiffs' Water Supply benefits Plaintiffs and logically does not save the Poultry Defendants from any expense or loss they are not obligated to incur or sustain.

Plaintiffs' attempt to revise their unjust enrichment claim by reference to Dr. Holmes' testimony that the Poultry Defendants saved $16 million by not exporting litter from the Watershed is equally unpersuasive. In this version of Plaintiffs' unjust enrichment claim, there is no expenditure by Plaintiffs. They did not pay to have litter exported and therefore cannot argue that they have "saved" the Poultry Defendants from any expense, nor has there been a "benefit" conferred upon the Poultry Defendants by an expenditure by Plaintiffs.

PROPOSITION IX

PLAINTIFFS' CLAIMS FOR JOINT AND SEVERAL LIABILITY AGAINST THE POULTRY DEFENDANTS PURSUANT TO THEIR CAUSES OF ACTION FOR NEGLIGENCE, NEGLIGENCE *PER SE* AND NUISANCE ARE BARRED BECAUSE PLAINTIFFS' OWN FAULT HAS CONTRIBUTED TO THE DAMAGES FOR WHICH THEY SEEK TO IMPOSE JOINT AND SEVERAL LIABILITY.

In the Motion, the Poultry Defendants sought a finding as a matter of law that because of their own fault (which has not been denied) Plaintiffs could not recovery damages jointly and severally from the Poultry Defendants under their causes of action for negligence, negligence *per se* and nuisance. In their Response, Plaintiffs correctly point out that they have recently moved to dismiss their negligence and negligence *per se* claims pursuant to a motion that has not yet been ruled upon this Court. In an act of apparent confidence in their ability to prevail on the motion to dismiss those claims or perhaps in recognition of the correctness of Defendants' joint and several arguments with respect to negligence and negligence *per se* claims, Plaintiffs have chosen to not even address the joint and several liability issues in the context of the negligence and negligence *per se*. Accordingly, if the Court denies Plaintiffs' Motion to Amend Pleadings

to Dismiss Negligence and Negligence *Per Se* Claims, the Poultry Defendants are entitled to a finding as a matter of law that any damages recovered by Plaintiffs pursuant to those causes of action must be assessed severally rather than jointly and severally.

While Plaintiffs have not challenged the Poultry Defendants' analysis of the joint and several liability issue in the context of the negligence and negligence *per se* claims, they have devoted a substantial portion of their Response to arguing that joint and several liability is available pursuant to their nuisance claim. Plaintiffs' entire argument on this issue is premised upon their position (articulated for the very first time in their Response) that they are pursuing an "intentional" nuisance claim. Once again, Plaintiffs are attempting to create a distinction that does not exist. Nuisance in Oklahoma is statutory. The Oklahoma Courts have not recognized a specific mental state requirement with regard to the cause of action of nuisance and have consistently permitted recovery under a claim of nuisance on facts which are more closely aligned with negligence principles as opposed to intentional tort principles. *See, City of Ada v. Canoy*, 177 P.2d 89 (Okla. 1947) (Where municipality installed sewer system which it believed to be adequate, but which proved to be inadequate, its continued operation constituted a nuisance for which the municipality was liable). Furthermore, Oklahoma's comparative negligence statute that applies to all actions when damage to property is alleged. 23 O.S. 1981 § 13.

Moreover, in the absence of any express authority under Oklahoma law on the issue of whether a plaintiff who is also at fault for the injury complained of can recover jointly and severally from defendants, the Poultry Defendants believe that this Court should look to the overwhelming authority from other jurisdictions. That authority is discussed at length in Section V(F) of the Poultry Defendants' Motion and in the interest of brevity is not recited herein again. Suffice it to say, that the Restatement of Torts 2d and the majority of courts to have considered

the issue have concluded that "[w]here the acts or omissions constituting negligence are the identical acts which allegedly gave rise to a cause of action for nuisance, the rules applicable to negligence will be applied." (*See*, 58 Am. Jur. 2d *Nuisances* § 72, p. 728; *see also*, Motion pg. 54-56 and cases cited therein.) Notwithstanding their recent attempts to distance themselves from the allegations of "negligence" contained in their own pleadings, it is inescapable that the "acts or omissions constituting negligence are the identical acts which allegedly gave rise to a cause of action for nuisance." Plaintiffs in this case plead the very same facts for their causes of action for negligence and nuisance. (*See generally* First Am. Compl. ¶¶ 47-52, 57-63). In fact, in the first two paragraphs of Plaintiffs' nuisance claim, they incorporate by reference the allegations of their negligence and negligence *per se* claims set forth previously in their complaint and refer expressly to "Defendants' wrongful conduct, as alleged above," another direct reference to the interrelationship between Plaintiffs' nuisance claim and their negligence claims. (*See* First Am. Compl. ¶¶ 47-48.)

Furthermore, even if Plaintiffs are permitted to recast the clear negligence based allegations of their nuisance claim under a late-adopted theory of "intentional nuisance," the evidence of Plaintiffs' fault in contributing "pollutants" remains relevant. Oklahoma law has consistently applied "contributory negligence" type defenses in the context of intentional torts to preclude a plaintiff from recovering where there is evidence that the plaintiff has intentionally committed illegal or unlawful acts. *See, e.g., Bowman v. Lunsford*, 54 P.2d 666 (Okla. 1936) (holding that where parties to unlawful or illegal transaction are *in pari delicto* with each other, each is estopped, as to the other, to take advantage of his own moral turpitude, illegal act, or criminal conduct to recover damages for injury sustained as a consequence of their joint wrong); *White v. Shawnee Milling Co.*, 221 P. 1029 (Okla. 1923) (If a party suffered injury while

violating a public law, he cannot recover for the injury from another transgressor if the unlawful act was a cause of the injury). It is undisputed that the Plaintiffs contributed to the very injuries upon which their claims in this case are based through intentional conduct knowingly pursued by Plaintiffs in direct violation of existing Oklahoma law. Plaintiffs' intentional and unlawful conduct is described expansively in Section V(B) of the Poultry Defendants' Motion. Through the unlawful operation of the Eucha Lagoons which led to a judgment against Plaintiffs reciting numerous findings of unlawful conduct and through their deliberate and knowing practice of mixing "contaminated" water from Lake Oologah with the water that Plaintiffs contend has been contaminated by the Poultry Defendants, Plaintiffs have, as a matter of law, contributed to the injuries and damages for which they now seek to impose liability upon the Poultry Defendants. As such, the Plaintiffs are jointly liable intentional wrongdoers, who at best, are only entitled to contribution. Accordingly, just as is the case with their negligence and negligence *per se* claims, Plaintiffs cannot recover jointly and severally from the Poultry Defendants under their nuisance claim.

CONCLUSION

For the foregoing reasons as well as those set forth in the Motion, this Court should enter summary judgment in favor of the Poultry Defendants on all claims for relief contained in Plaintiffs' First Amended Complaint. In the alternative, the Poultry Defendants are entitled to the entry of partial summary judgment in favor of: (i) dismissing the Plaintiffs' First Claim for Relief (Cost Recovery and Contribution Under CERCLA §§ 107 and 113), (ii) dismissing all claims asserted on behalf of Separate Plaintiff TMUA, (iii) dismissing the Plaintiffs' Third Claim for Relief (Nuisance) to the extent that such claim for relief seeks to recover damages for annoyance and inconvenience or other "emotional injuries," (iv) dismissing the Plaintiffs'

Seventh Claim for Relief (Unjust Enrichment), and (v) dismissing all claims for joint and several liability against the Poultry Defendants.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OKLAHOMA

THE CITY OF TULSA, et al.,)
)
Plaintiffs,)
)
-vs-) CASE NO. 01-CV-900-EA
)
TYSON FOODS, INC., et al.)
)
Defendants.)

TRANSCRIPT OF MOTIONS HEARING

HAD ON JANUARY 3, 2003

BEFORE THE HONORABLE CLAIRE V. EAGAN

UNITED STATES DISTRICT JUDGE

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trying to sell is basically the rule that says a bailor shall not be liable to third parties for the negligent use of the bail property by the bailee in the absence of control.

THE COURT: I know your argument.

MR. ROARK: Okay.

THE COURT: We don't have a negligence case.

MR. ROARK: That's right, we don't have a negligence claim. It's a nuisance claim. And there is plenty of control, as Mr. Kernan just went through here, to take it out of that rule. So -- and it's not a bailment in the first place because there's not a full transfer of possession of these chickens, given all the control issues. So there's lots of reasons why this is not a bailment and that argument doesn't apply.

THE COURT: Very well.

Okay. Mr. Tucker, are you going to address, does Cargill want to argue any standing or right to bring -- just one second. Are you going to address anything further that's in the Cargill briefs?

MR. JOHN TUCKER: The Cargill brief, yes, ma'am. It's actually separate from -- the Cargill brief raises two points that haven't been addressed in the summary judgment motion --

THE COURT: Right.

MR. JOHN TUCKER: -- of the joint defendants.

THE COURT: Right. You're going to reserve separate argument for that.

MR. TAYLOR: Well, Judge, I'm supposed to argue the TMUA standing aspect.

THE COURT: All right. Let me hear your reply on -- let's not belabor the PSA.

MR. GRAVES: I won't, Judge. I just wanted to point out that I didn't -- I want to point out again that I didn't stand up here and say that the act --

THE COURT: You didn't.

MR. GRAVES: -- expressly says that or anything of that nature, but given the act itself --

THE COURT: You said what he was going to say too. You told me that he was going to argue that there's nowhere in the act.

MR. GRAVES: Right. Given the act and the food safety regulations and things of that nature, there are reasons for these things that are in the contract that have to be there.

THE COURT: I understand.

MR. GRAVES: The other thing is on the Stevens case that he brought up, the Tyson versus Stevens case, that case related to swine, which is liquid manure first of all, which is a completely different thing than dry poultry litter, and the Packers and Stockyards Act did not apply to swine until this summer. So there was a reason why that argument wouldn't have been made in that particular case.

THE COURT: Thank you.

Mr. Taylor, it's your time.

MR. TAYLOR: Your Honor, if it please the Court, this is the simplest to understand and the simplest to apply the facts to the law, but it's often an area that courts are reluctant to sustain because of the practical impact that occurs.

TMUA does not own the water. The water is owned by the State of Oklahoma. And as a result, TMUA nor the City, and we'll let Mr. Tucker address that in a moment, have any standing with which to bring this lawsuit.

This lawsuit is brought over a body of water, or waters I should say, Spavinaw and Eucha, that are owned by the State of Oklahoma and that have been appropriated to the City since 1938.

Now, the TMUA does not have any employees. It is a public trust without employees, income, or expenses. That's from the former Mayor Susan Savage deposition and the Patsy Bragg deposition. It has no income. Its funds are provided to it by the City in an amount determined by the City Council. That's from the Susan Savage deposition as well. And then there's also language in the lease with the City that references certain real properties, none of which are located outside of Tulsa County in that particular reference to real properties.

But the core of it, Judge, comes to this. Imagine

this hypothesis: In your private office you have, if I remember correctly from your days as a magistrate, some very eclectic personal items. Those belong to the Honorable Claire Eagan personally.

THE COURT: Some of them.

MR. TAYLOR: Right. There are also items in your personal office that are allocated to you as a judge. Those are allocated to you either by the General Services Administration or by the Justice Department or, as this video screen says, U.S. Courts Oklahoma Northern District. Those are allocated but they are not your ownership.

Imagine that there is painting going on in your courtroom -- I'm sorry, in your office, and that in the course of that painting that you contend that there is paint that has gotten on your personal furniture and on that that is allocated to you by the Justice Department or by GSA. You personally have then an action against the painter, but you as the judge do not have an allocation -- have an action against the painter for what has been allocated to you. Only the entity that actually owns that, which would be either General Services Administration or the Justice Department, can bring that action.

The same is true here. There is no consideration for this allocation. The City of Tulsa and TMUA are political subdivisions, and the State of Oklahoma has the ownership

interest. And so they are -- the TMUA, and as Mr. Tucker will point out subsequently, the City of Tulsa are not the proper entities, do not have the standing.

That puts you in a very difficult position, because if you agree, you have to ultimately dismiss this case at this stage of the game, which is a very tough thing to do. But it's nevertheless what the facts applied to the law require you to do.

THE COURT: What about the cases and the statutes cited by the plaintiffs in their response?

MR. TAYLOR: Well, we think that the Okmulgee Coal case versus Hinton says that the real party in interest is the one legally entitled to the proceeds of a claim and that because those damages were, in that case were borne by the City, only the City is legally entitled. If this water is damaged, the owner of it is the one that must bring this action.

THE COURT: Under Oklahoma law, any person having a right to the use of water from a stream whose right is impaired by the act or acts of another or others may bring suit in district court.

MR. TAYLOR: But, Judge, we believe that that is the State of Oklahoma. Mr. Tucker is also going to address this with regard to the City.

TMUA, though, is what I'm here to address first and

foremost. There has been no allocation of this water from the state to the Tulsa Municipal Utility Authority. TMUA does not have the standing to bring the action. Mr. Tucker will address more specifically the City of Tulsa's claim.

THE COURT: Let's do TMUA then on behalf of the plaintiffs.

MR. McKINNEY: Your Honor -- pardon me. Do you want to do that?

MR. ROARK: Some of this will apply to Mr. Tucker. I'll wait and deal with some of that.

Of all the smoke screens that the defendants have thrown up in this case, I have to say that these two arguments that the TMUA and the City of Tulsa don't have a right to be in this court to protect their own drinking water is the most preposterous of any argument that they allege.

The TMUA, by lease agreement, and this is in Exhibit N to our attachments to the brief, has the responsibility to own, operate and protect all the assets of the water system in the city of Tulsa. They have an interest and a legal obligation to protect those rights. They contract to take care of the water system, they incur indebtedness to take care of the water system, and indeed they are the contracting party who incurred many of the costs that are at issue in this case. They contracted for the studies in the watershed. They run the water treatment plan, if you will.

Now, they have incurred the $4.1 million we're talking about. I don't know what other kind of standing or interest a party has to have to bring a lawsuit, but they've paid the bills.

The idea about ownership I'm going to reserve, because that's really probably more of what Mr. Tucker is going to talk about, as to who owns the water. But if you follow the defendants' argument to its conclusion, they would tell you that only the State of Oklahoma has the standing in this state to ever bring a nuisance claim for any pollution to any water body in the state of Oklahoma because they own all the waters of the state. Therefore, nobody else has a right to bring an action in nuisance.

That's preposterous. The case law would not bear that out. I don't know if they're suggesting that to you, but that's the conclusion you reach.

It's also not the law with respect to what it takes to bring a nuisance claim, both a private nuisance claim and a public nuisance claim, but I'm going to wait and deal with that after Mr. Tucker gives his presentation on this.

The example that Mr. Taylor gave you about the paint damage in your office on property is a little different because that would be an action for property damage, not a nuisance action. And there's a big difference about who can bring a nuisance action to protect the public's rights as well as your

own individual rights. Plenty of people besides the property owner can bring an action for a nuisance, particularly a public nuisance.

And again, I'm going to address that in a little more detail after Mr. Tucker speaks. But the idea that the TMUA is not a real entity and has no assets and is a hollow shell kind of corporation and can't be in front of you in this court is preposterous. They are a legal entity, a trust set up by law, and they're doing what they're obligated to do, which is to protect the water system that the defendants have polluted.

THE COURT: Thank you.

All right, Mr. Tucker.

MR. JOHN TUCKER: May it please the Court, Your Honor, John Tucker for Cargill and the other defendants on the issue of what does the City of Tulsa have a right to do and what do they not have a right to do in this court.

It's undisputed that Tulsa does not own the water in Spavinaw Lake or in Eucha Lake. It's undisputed and was confirmed by a court proceeding in 1938 that Tulsa acquired an allocation of an amount of water, an allocation of the right to draw and to impound and draw and take water from Spavinaw Creek. That allocation came to the City of Tulsa from the State of Oklahoma. The allocation is as to quantity. No reference is made in the allocation as to quality, merely as to a quantity of water which can be taken each year.

The City of Tulsa essentially has a water right that is a kind of right that is not a riparian right. It's not the right to use the land -- the water that crosses your land for purposes having to do with your land for domestic purposes. It is a right that was beyond that and beyond a riparian right that could only be obtained from the State of Oklahoma.

In the plaintiffs' response to our motion with regard to standing, the quicksand that you can get into if you aren't careful is set out at page 7 of their brief when they say in the last paragraph, "Interference with water rights is plainly an invasion of a legally protected interest." There's no objection about that. Clearly, interference with water rights is plainly an invasion of a legally protected interest.

They then say, "The common law of nuisance allows recovery, embodied under Title 50, allows recovery of damages for wrongful interference with one's use or enjoyment of rights or interests in land." Your Honor, we're not dealing with a right or an interest in land. We are dealing with a water right. It's a property interest, but it's not a possessory interest. It's not -- and I never was very good in Property I, but I think this is what they called having to have a right coupled with an interest.

They've got a right, but the right doesn't come from their land; it comes from the State of Oklahoma. And the right is limited to the right to take water. Here, Tulsa's protected

interest is the right to take water, which is not a possessory interest. The City is not the riparian owner of that amount of the water.

And I know Your Honor will recall from other briefing that was presented in this matter the Department of Environmental Quality charged the City of Tulsa with violations having to do with its intentional discharge from its sewage lagoons at Lake Eucha. The action that was brought by ODEQ was to protect the waters of the state, which is Lake Eucha, and that's where their authority came from to levy that charge.

And the whole point we're raising, whether you talk about the City of Tulsa or TMUA, is that nothing is alleged that the City's right to take water has been interfered with, and there's no basis for any cause of action for interference with the right to take water that was allocated to the City.

THE COURT: Thank you.

MR. JOHN TUCKER: Thank you.

THE COURT: Mr. Roark.

MR. ROARK: Your Honor, a fair reading of the permit and order issued by the Oklahoma Resources Planning Board in 1938 cannot be read any other way but to say that the appropriative rights that that gave the City of Tulsa to take this water clearly gave it possession of the water, if it did not give it title to the water. They have been using and appropriating the water ever since.

The idea that there's some distinction between the law that we cite under nuisance law that talks about possession of land and what we're talking about here, water rights, they don't cite any case law that draws this distinction, the dichotomy between water and land and nuisance applies to land but it doesn't apply to water.

The rights of -- this is both a private nuisance and a public nuisance. The plaintiffs, to the extent they have a private nuisance, they have a special interest because they've incurred, the cities and TMUA have incurred the $4.1 million. That makes it a private nuisance. As to those entities, they have paid the bill.

When you talk about private nuisance, the law is clear and the Restatement is clear, the case law in Oklahoma is clear that you don't have to have title. You can bring it with a mere possessory interest. They don't quote any law to the contrary. There is no law to the contrary. It's as old as the law can be. So a mere possessory interest is sufficient to bring a private nuisance.

When we talk about public nuisance, an action is brought for the benefit of the public and you don't have to bring -- you don't have to be the owner of the property to bring a public nuisance. Indeed, the law is old, and there's both Arkansas law we cite and Oklahoma law, that a municipality is indeed the proper party to bring an action for a nuisance, a

public nuisance, that is injurious to the citizens of that municipality.

That's what's going on here. The idea that the City of Tulsa cannot bring a public nuisance action to protect its citizens from its own public water drinking supply is preposterous, it's absurd, but that's what the defendants are suggesting.

We have rights under four statutes: the water law rights under Title 82, the environmental laws under 27A, the public nuisance laws under Title 50, the municipal law that we brought a claim on that prevents the pollution of a public water supply. All of those statutes give special rights to the plaintiffs in this case to protect their water supply, and there's simply no question but that they've got the right to be plaintiffs in this case.

THE COURT: Thank you.

All right. Now do we want to go to Peterson, City of Decatur, or any other issues that have been briefed?

MR. JOHN TUCKER: Joint and several liability was also briefed in the joint motion for summary judgment. With the Court's permission, I would like to address that.

THE COURT: Certainly.

MR. JOHN TUCKER: This matter began, as the Court will recall, as an action that had a number of causes of action alleged, one of which was negligence.

AFFIDAVIT OF J.D. STRONG

J.D. Strong, being of lawful age and first being sworn upon his oath, deposes and states as follows:

1. I am the Secretary of the Environment of the State of Oklahoma. I am also the trustee for natural resources for the State of Oklahoma under CERCLA.

2. I have personal knowledge about the natural resources in that portion of the Illinois River Watershed located within Oklahoma, as well as the agencies that exercise regulatory, control and management functions over such natural resources on behalf of the State of Oklahoma. These agencies include, without limitation, those listed below.

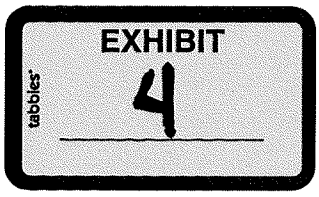
3. The State of Oklahoma acting through the Oklahoma Department of Environmental Quality conducts regulatory, control and management functions in that portion of the Illinois River Watershed located within Oklahoma including, without limitation, the following:

a. Regulation of municipal and industrial point source discharges. 27A Okla. Stat. § 1-3-101(B)(1);

b. Surface water and groundwater quality and protection and water quality certifications. 27A Okla. Stat. § 1-3-101(B)(4);

c. Regulation of public and private water supplies. 27A Okla. Stat. § 1-3-101(B)(6).

4. The State of Oklahoma, acting through the Oklahoma Water Resources Board, conducts regulatory, control and management functions in that portion of the Illinois River Watershed located within Oklahoma including, without limitation, the following:



a. Jurisdiction for water quantity, including but not limited to, water rights, surface water and underground water, planning, and interstate stream compacts. 27A Okla. Stat. § 1-3-101(C)(1).

b. Flood plain management. 27A Okla. Stat. § 1-3-101(C)(4).

c. Dam Safety. 27A Okla. Stat. § 1-3-101(C)(3).

d. Water Quality Standards development and accompanying use support assessment protocols, anti-degradation policy and implementation, and policies generally affecting Oklahoma Water Quality Standards application and implementation, including but not limited to, mixing zones, low flows and variances or any modification or change thereof pursuant to Section 1085.30 of Title 82 of the Oklahoma Statutes. 27A Okla. Stat. § 1-3-101(C)(9).

5. The State of Oklahoma, acting through the Oklahoma Department of Wildlife Conservation, conducts regulatory, control and management functions in that portion of the Illinois River Watershed located within Oklahoma including, without limitation, the following:

a. Investigating wildlife kills. 27A Okla. Stat. § 1-3-101(H)(1).

b. Wildlife protection and seeking wildlife damage claims. 27A Okla. Stat. § 1-3-101(H)(2).

c. Issuing fishing licenses. 29 Okla. Stat. § 4-110.

d. Issuing hunting licenses. 29 Okla. Stat. §§ 4-101,112

e. Closing the waters of the State to fishing. 29 Okla. Stat. § 6-502.

6. The State of Oklahoma, acting through the Oklahoma Scenic Rivers Commission, conducts regulatory, control and management functions in that portion of the Illinois River Watershed located within Oklahoma including, without limitation, the following:

a. Promulgating rules and issuing orders necessary to protect the public interest. 82 Okla. Stat. § 1461(G)(b).

b. Establishing fees for commercial canoe operators. 82 Okla. Stat. § 1470.

c. Acquiring, developing and maintaining public access points. 82 Okla. Stat. § 1454.

d. Protecting the natural resources of the Scenic Rivers in the Illinois River Watershed. O.A.C. 630:15-1-1.

7. The State of Oklahoma, acting through the Oklahoma Department of Mines, conducts regulatory, control and management functions in that portion of the Illinois River Watershed located within Oklahoma including, without limitation, the following:

a. Mining regulation. 27A Okla. Stat. § 1-3-101(G)(1).

b. Inspecting surface mining operations. 45 Okla. Stat. § 907.

c. Reviewing and issuing surface mining permits. O.A.C. § 460:10-3-4.

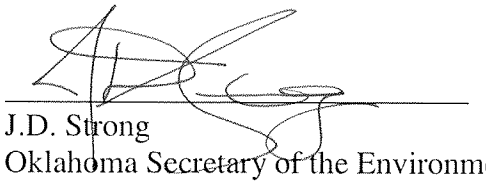
8. The State of Oklahoma, acting through the Oklahoma Department of Agriculture, Food, and Forestry, conducts regulatory, control and management functions in that portion of the Illinois River Watershed located within Oklahoma including, without limitation, the following:

a. Registering and regulating poultry feeding operations. 2 Okla. Stat. § 10-9.1, et seq.

b. Certifying poultry waste applicators. 2 Okla. Stat. § 10-9.16, et seq.

c. Regulating concentrated animal feeding operations. 2 Okla. Stat. § 20-40 et seq.

Further affiant sayeth not.



J.D. Strong
Oklahoma Secretary of the Environment

Dec. 15, 2008
Date

Subscribed and sworn to before me this 15th day of December, 2008.

Notary Public

JOYCE K. BOYD NOTARY # 02017963 EXP. 11/09/10 PUBLIC STATE OF OKLAHOMA

My Commission Expires: 11-9-10

My Commission No. 02017963

CONDENSED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, ex rel. W. A. DREW EDMONDSON, in his capacity as ATTORNEY GENERAL OF THE STATE OF OKLAHOMA and OKLAHOMA SECRETARY OF THE ENVIRONMENT C. MILES TOLBERT in his capacity as the TRUSTEE FOR NATURAL RESOURCES FOR THE STATE OF OKLAHOMA,

Plaintiffs

vs.

05-CV-0329 GKF SAJ

TYSON FOODS, INC., TYSON POULTRY, INC., TYSON CHICKEN, INC., COBB-VANTRESS, INC., AVIAGEN, INC., CAL-MAINE FOODS, INC., CAL-MAINE FARMS, INC., CARGILL, INC., CARGILL TURKEY PRODUCTION, LLC, GEORGE'S, INC., GEORGE'S FARMS, INC., PETERSON FARMS, INC., SIMMONS FOODS, INC., and WILLOW BROOK FOODS, INC.,

Defendants

VOLUME II
VIDEOTAPE DEPOSITION OF ALAN LEE FORD
Taken on Behalf of the Defendants
On July 21, 2008, beginning at 9:00 a.m.
In Oklahoma City, Oklahoma

APPEARANCES:

Appearing on behalf of the PLAINTIFF STATE OFOKLAHOMA

Robert A. Nance
Trevor Hammons, Attorney at Law
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Reported By: Becky C. Dame, CSR, RPR

EXHIBIT 5

MS. SOUTHERLAND: I have no questions.
MR. NANCE: Does anyone on the phone have any questions?
MS. GRIFFIN: No.
MR. SANDERS: Not for Cal-Maine.
MR. NANCE: Let's take a short break and then we'll have a few.
THE VIDEOGRAPHER: Off the record at 2:30.
(Off the record.)
THE VIDEOGRAPHER: We're on the record at 2:54.

CROSS-EXAMINATION

BY MR. NANCE:

Q Good afternoon, Mr. Ford. As I think you know, I'm Bob Nance. I represent the State of Oklahoma.

A Yes, sir.

Q Let me ask you to think back to the time when you came to work at the Department of Central Services in January of 2006.

Would you tell us, please, what the condition of the real property inventory was at that time?

A Well, it was -- there was an electronic version, but it was basically useless. You couldn't

do any kind of sorts, you couldn't print off any reports unless you printed one record per page. You couldn't manipulate that data in any way. The access database that makes up the real property inventory at that time had lost basically all its functionality.

The records were kept in several different places. The electronic records, copies of deeds, agreements, the paper records, copies of deeds, abstracts, agreements, kept in about three different places. There had really been no one working the real property inventory for the last several years.

Q In January 2006, could that database sort properties by county the way you've done on the spreadsheet you've given us in this deposition?

A No, sir. I couldn't make it sort in any way, shape, or form --

Q Okay.

A -- so I couldn't have given you counties.

Q Okay. And in the intervening two-and-a-half years, have you whipped that database into the shape that it's in today?

A Sir, yes, sir.

Q I'm going to jump around here a little bit and I apologize.

On a number of occasions you told Mr. Bond that you did not have information, for instance, about the depth of groundwater.

Do you recall that testimony?

A Yes, sir.

Q When you talked with people about various locations, did you ask them about the depth of groundwater?

A Yes, sir, I did. I always asked that.

Q Let me invite you to think about Natural Falls State Park.

Is there a spring on that location?

A There is a spring at that location.

Q So we know, at least at that point, there's groundwater that surfaces at that location; is that correct?

A That's correct.

Q Okay. Mr. Bond asked you a number of questions over -- I guess in the first session about the State's assertion of standing to sue these defendants for trespassing.

Do you recall talking about that?

A Yes, sir, I do.

Q Okay. Let me ask you if the State of Oklahoma asserts standing to sue these defendants

for trespass for all surface waters in definite streams in the Oklahoma portion of the Illinois River Watershed?

A Yes, sir.

Q Would that include the main stem of the Illinois River?

A Yes, sir, it would.

Q Would it include Lake Tenkiller?

A Yes, sir, it would.

Q Would it include the tributaries of either the Illinois River or Lake Tenkiller?

A Yes, sir, it would.

Q Where there's water flowing in a definite stream?

A Yes, sir.

Q And in connection with the discussion you had about groundwater, does the State of Oklahoma assert standing to sue these defendants for trespass for the groundwater under any property owned or leased by the State of Oklahoma?

A Yes, sir.

Q So if -- if we went through every one of the properties in your spreadsheet, and I asked you the same question about this property or that property, would the answer be the same?

A That's correct, it would be the same.
Q Okay. And any property owned or leased that you discussed with Mr. Bond, or even that you haven't discussed that's in the spreadsheet?
A That's correct.
Q Let's talk for a moment about flowing groundwater. That's groundwater in a definite stream underground. Okay?
A Okay.
Q Does the State of Oklahoma assert standing to sue these defendants in trespass for groundwater in definite streams flowing under the surface in the Oklahoma portion of the Illinois River Watershed?
A Yes, sir, that's correct.
Q And would that be true no matter who the surface owner was?
A Yes, sir, that is correct.
Q You talked with Mr. Bond about, oh, reporting, annual reporting or monthly reporting documents on the land application from -- I think it was mentioned in Paragraph 10 of Exhibit 11.
Do you recall that?
A Yes, sir.
Q And you said that there were no monthly reports provided; is that right?

A That's correct.
Q Was that because they did not apply outside the lagoons?
A That's because they did not apply outside the lagoons, yes, sir.
Q Okay. I think we have made some supplemental inquiry about fertilizing some of these waste management areas -- wildlife management areas. Let me ask you if we have determined whether or not there was any fertilizer applied in the past at the Cookson Wildlife Management Area?
A No, sir, there's none.
Q Do you have a handwritten note?
A Yes, I do. Okay. I'm sorry.
This information provided to me by counsel. Now, what facility are we talking about? I'm sorry.
Q Cookson.
A They fertilized last year roughly the same amount as this year. They fertilized approximately five times in the last ten years. Fertilizer was applied after a soil test was conducted.
They're growing clover for these wildlife management areas, is what they're doing. They've got four fields east of the headquarters building

which is on the west side of the W May, about halfway between north and south to both northern and southern boundaries.
Q Okay. What about fertilizing in the past on the Cherokee Wildlife Management Areas?
A They have fertilized for the last several years ago -- or several years ago. Again, they're growing clover. They're applying basically at the same rate that they do at the Cookson Wildlife Management Area.
Q Okay.
A Five times in the last ten years, somewhere in there.
Q All right, sir. There was some discussion you had with Mr. Bond about the date of the construction of the pit privies in the Scenic Rivers Access Areas.
Do you recall that testimony?
A Yes, sir.
Q As a result of additional inquiry, can you give us any more precise date of the construction of those various pit privies?
A They were all built between 1988 and 1994.
Q Okay.
MR. NANCE: Mr. Bond, can I borrow one of

your Exhibit stickers?
MR. NANCE: If we skipped 27, we'll fill it in. Let me hand you those I think I gave you one earlier. I'm going to have to ask for one back.
(Exhibit 27 marked for identification.)
BY MR. NANCE:
Q Mr. Ford, I've marked as Exhibit 27 something I think you have a copy of. It's -- would these be printouts of computer screen maps for various wildlife management areas?
A Yes, they are.
Q Okay. And do these come from the system maintained by the Oklahoma Wildlife -- Oklahoma Department of Wildlife Conservation?
A Yes, sir, they are.
Q Okay. I would like to invite your attention to the very last page of Exhibit 27, and, particularly, I want to talk with you about the two areas at the bottom of that map, the lower Illinois River PFHA and the Kerr-McClellan Wildlife Management Area, Robert S. Kerr Pool.
Do you see those down there?
A Yes, sir, I do.
Q Let me ask you whether the State of Oklahoma own those two areas?